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CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Colorado

AT THE

April and September Terms, A. D. 1911.

E. T. WELLS,
REPORTER.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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MORTON S. BAILEY,
WILLIAM A. HILL,
GEORGE W. MUSSER,
S. HARRISON WHITE,
*JAMES E. GARRIGUES,

} JUSTICES.

BENJAMIN GRIFFITH, ATTORNEY GENERAL.
JAMES R. KILLIAN, CLERK.
E. T. WELLS, REPORTER.

---

*Elected November 8, 1910, to succeed Hon. Robert W. Steele, deceased.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO.

APRIL TERM, 1911.

[No. 5788.]

STRATTON'S INDEPENDENCE, LIMITED, v. STERRETT, ADMINISTRATRIX.

1. REMOVAL OF CAUSES—*Fraudulent Joinder of Defendant to Prevent*—An alien or citizen of another state has an absolute right, in a proper case, to remove to the federal court a cause pending against him in the state court, and this right is not to be defeated by joining as defendants, residents and citizens who have no interest in the controversy—(23).

A plaintiff may join resident citizens as defendants, in his action against an alien or non-citizen, for the sole purpose of preventing the removal of the cause, provided he has a joint cause of action; but where in such case his complaint wholly fails to state a joint cause of action, such failure warrants the conclusion that the joinder of the resident and citizen defendants was fraudulent—(27, 34).

Where a miner suing for an injury attributed by his complaint to the alleged joint and concurring negligence of his employer, an alien corporation, and the tram-boss and shift-boss, his immediate superiors, residents and citizens, in permitting the place of his work to be unsafe, not averring that the corporation had delegated to these individual defendants, or either of them the duty to make the place safe, it was *held* that no cause of

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action was shown as against them, and not withstanding their joinder the alien corporation was entitled to remove the cause.

An averment that the tram-boss had assured plaintiff that the place was safe, and ordered him to continue working there, not alleging that the tram-boss had any authority in this respect from the company, was held to state an independent cause of action against the tram-boss alone, which the corporation was in no manner responsible, and which therefore was no impediment to the removal of the cause on its petition—(27).

2. ——*Issue of Fact*—Where a citizen and resident plaintiff institutes his action against citizen and resident defendants, and an alien defendant, a petition for removal, by the alien defendant, alleging that the individual defendants were fraudulently joined, merely to prevent the removal of the cause to the federal court, presents an issue of fact triable only in the federal court, and the cause is removable, for this reason alone—(27).

3. ——*Petition*—Where the complaint in the cause sought to be removed shows upon its face grounds for removal, it is not necessary to repeat in the petition the facts so disclosed.—(29).

4. ——*Effect of Petition and Bond*—Where a petition showing grounds to remove the cause to the federal court is presented, with a sufficient bond, the jurisdiction of the state court, except to grant the petition, is ousted, the cause is at once removed, and all other proceedings in the state court are *coram non judice*—(30).

5. PARTIES—*Joinder of Defendants—Joint Torts*—Two or more are not to be joined as defendants to an action for a tort, merely because each is liable therefor. The injury must be the result, in some sense, of their joint action, before they can be made jointly liable therefor—(26).

6. PLEADINGS — *Complaint — Construction* — A complaint against a mining corporation and two of its subordinate officers, for an injury to a common miner, attributed to the joint and concurring negligence of all the defendants, construed. and held to state no cause of action as against the defendants jointly—(24, 25).

Appeal from Teller District Court—Hon. ROBERT E. LEWIS, Judge.

Messrs. DORSEY & HODGES, for appellant.

Mr. JOHN M. GLOVER, for appellee.

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Judgment reversed.

Cause remanded with directions.

Mr. JUSTICE GABBERT delivered the opinion of the court.

Sterrett, plaintiff below, by his next friend, Minnie L. Sterrett, brought suit against appellant and Angus MacDonald and Robert McKenzie, as defendants, to recover damages in the sum of fifty thousand dollars, claimed to have been sustained by the joint and concurring negligence of these parties. The individual defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against them, or either of them. The defendant corporation was engaged in mining, and for convenience will be referred to as the Mining Company. In apt time, the Mining Company, under the provisions of the Act of Congress relating to removal of causes from state to federal courts (U. S. Comp. Stats. 1901, p. 508 *et seq.*,) filed a petition and the requisite bond, duly approved, to remove the cause to the circuit court of the United States for the District of Colorado, which was denied. Thereafter it filed a general and special demurrer to the complaint. This demurrer, and also the one filed by the other defendants, was overruled. Each of the defendants then answered separately, to the affirmative defenses of which the plaintiff replied. The trial resulted in a verdict and judgment against the Mining Company in the sum of ten thousand dollars, and a verdict, as directed by the Court, in favor of the defendants, MacDonald and McKenzie. The Mining Company appeals. Since the appeal plaintiff has died, and his next friend has been substituted as the representative of his estate.

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Two classes of errors are assigned: (1) That the court erred in denying the petition to remove the cause to the federal court; and (2) errors, relating to the rulings on the demurrers to the pleadings, and those claimed to have been committed at the trial. We shall first consider the action of the trial court in denying the petition of the Mining Company to remove the cause to the federal court, for the reason that if it should be found that the court erred in denying the petition, then it is wholly unnecessary, as well as improper, to consider the other errors assigned.

The complaint alleged that plaintiff and his next friend, and defendants MacDonald and McKenzie, were residents of the State of Colorado; and the petition for removal, after alleging that the matter in dispute exceeded, exclusive of interest and costs, the sum of two thousand dollars, that Sterrett and his next friend were residents and citizens of the State of Colorado, and that the Mining Company, at the time of the commencement of the action was, and ever since has been a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain, and a citizen and resident thereof, was based substantially upon the following grounds or averments:

That, in fact, there is no real controversy between the plaintiff and the individual defendants, or either of them; that neither of these parties is a real defendant, but are fictitious and sham defendants; that they were not joined with petitioner in good faith, and with the intent and purpose of prosecuting a *bona fide* claim against them, but were fraudulently joined, as defendants, for the purpose of preventing a removal of the cause to the federal court by petitioner; that the facts alleged in the complaint do not constitute joint or concurring negligence upon the part of petitioner, and these defendants, or either of them; that these defendants are not necessary or indispensable

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parties to the action; that the controversy is wholly between the petitioner (a foreign subject and non-resident of Colorado), and plaintiff and his next friend, who are citizens and residents of Colorado, which can be fully determined as between them without the presence of the defendants, McKenzie and MacDonald; and that such separable controversy between petitioner and plaintiff and his next friend arises upon the allegations of the complaint.

For the purpose of considering the petition to remove, it becomes necessary to consider the averments of the complaint, which, after alleging that the defendants, MacDonald and McKenzie, were operatives, agents and employes of the Mining Company; that they, plaintiff and his next friend at all times mentioned were residents of the state of Colorado, and the defendant company a corporation organized and existing under the laws of Great Britain, alleges:

"4. That on, to-wit: The 18th day of January, 1904, at the County of Teller, State of Colorado, the aforesaid Harry Sterrett was an employe of the said The Stratton's Independence, Limited, engaged under the direction and control of the defendants, Angus MacDonald and Robert McKenzie, on the 100th level of the underground workings of the mine of the said Stratton's Independence, Limited, in Teller County, Colorado, in shoveling broken bodies of rock as by them directed, and the said Harry Sterrett was, in said work, under the immediate direction of the said Robert McKenzie, who was known as the "tram boss"; and the said Robert McKenzie was himself working under the immediate control and direction of the said Angus MacDonald, who was known as the "shift boss," in charge of the body of men of which the said Harry Sterrett was one; and the said Angus MacDonald was under the immediate direction and control of the said

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Stratton's Independence, Limited, and its executive officers.

5. That by the joint and concurring negligence of all of the defendants herein, the underground chamber or gallery in which the said Harry Sterrett was so working, contained, in the roof and sides thereof, partially loosened bodies of rock, liable at any time to fall and kill him and others working beneath and adjacent to the same; and the said defendants had for some days previous thereto negligently permitted this condition of things to remain, and negligently failed to have the said chamber or gallery properly timbered, and thereby protected in accordance with the due care and prudence required in careful mining operations.

6. That the said Harry Sterrett was very inexperienced, but a short time previous to the injury hereinafter detailed spoke to said McKenzie and called his attention to this condition, and asked if the place was safe to work in, whereupon the said McKenzie assured him that it was safe, and positively ordered him to continue to work there; and the said plaintiff, relying upon the greater experience of the said McKenzie, believed the conditions to be safe, and therefore continued to work, and this was before the injury hereafter detailed; and the plaintiff was relying in good faith upon the said assurance when so injured.

7. That on the 18th day of January, 1904, about three o'clock in the afternoon, while the plaintiff was so engaged under the direction of the said McKenzie in performing the work which the said McKenzie had ordered him to perform, a portion of this loosened rock fell, without warning, and struck the plaintiff, * * *."

The paragraph then details the injuries sustained, and concludes: "That by reason of the premises and the conjoint and concurrent negligence of the defendants, the plaintiff has suffered the injuries hereinbefore described, and has been damaged in the sum of fifty

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thousand dollars ($50,000.00), for which amount and the costs of this suit, he prays judgment."

The plaintiff and his next friend were citizens of this state, and the defendant Mining Company a citizen of the Kingdom of Great Britain. The defendants, McKenzie and MacDonald, were also residents of Colorado. If, then, it should appear, from an analysis of the complaint, that a cause of action is not stated against either of these parties, or that a controversy existed wholly between plaintiff and the Mining Company, which could be fully determined as between them, without the presence of the other defendants, who were residents of this state, the petition for removal should have been granted.

The basis of plaintiff's cause of action is the alleged joint and concurring negligence of the defendants. An action of tort for which several are jointly responsible, according to the averments of the complaint, may be brought against all, or one or more of them. Where, however, the resident defendants are joined with a non-resident, in an action of that character, brought in a state court, and it appears that a cause of action for the alleged tort is not stated against the resident defendants, or either of them, the mere fact that they are so joined does not prevent the non-resident defendant from removing the case to the federal court, upon the ground that they were fraudulently joined for the purpose of preventing such removal. We make this the test because upon both reason and authority such defendants are sham and fictitious; consequently, they are improperly joined, their presence is unnecessary, and their joinder in such circumstances will not defeat an application for removal on the part of the non-resident defendant.—*Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165; *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 745; *Prince v. Ill. Central R. Co.*, 98 Fed. 1; *Nelson v. Hennessey*, 33 Fed. 113;

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Cin., N. O. & T. P. Ry. Co. v. Robertson, 74 S. W. (Ky.) 1061; *Davis, Admr., v. Ches. & O. Ry. Co.*, 75 S. W. (Ky.) 275; Moon on Removal of Causes, § 131.

It has also been held that when it appears a cause of action is not stated against the resident defendants, they should be eliminated, and the case treated as one against a non-resident alone.—*Cella v. Brown*, 144 Fed. 742; *Louisville & N. R. R. Co. v. Newman*, 128 Ga. 283.

The important question, then, to first determine, is, does the complaint state a cause of action against MacDonald and McKenzie, or either of them? The gist of the charge against the Company is, that it negligently permitted the part of the mine in which plaintiff was employed to be and remain in a dangerous condition. Conceding that a cause of action is stated as against the company, because of its failure to exercise legal care in maintaining the place in the mine in which plaintiff was employed in a reasonably safe condition, what is charged with respect to the other defendants on this subject?

It is alleged that they were operatives, agents and employes of the defendant company; that plaintiff was under the immediate direction of McKenzie, who was the "tram boss"; that McKenzie was under the immediate control and direction of MacDonald, who was known as the "shift boss," in charge of the men, of which the plaintiff was one, and that MacDonald was under the immediate direction and control of the company and its executive officers. It is then charged, in substance, by paragraph 5 of the complaint above quoted, that by the joint and concurring negligence of all the defendants, the place in the mine in which Sterrett was employed was unsafe, in that it contained, in the roof and sides thereof, partially loosened bodies of rock liable to fall and injure him, and that defendants had for some days previous to his injury, negligently permitted this condition to remain, and had negligently

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failed to have the place in the mine where plaintiff was working properly timbered. In brief, the negligence charged upon which plaintiff relies as joint and concurring is, that the defendants failed to keep and maintain the place in the mine in which plaintiff was employed in a reasonably safe condition.

Plaintiff may have charged the defendant company with negligence in this respect, but has wholly failed to charge the other defendants with negligence on this score. So far as they are concerned, the complaint proceeds upon the theory of non-feasance on their part. If they could be held liable for negligence in this respect (a question upon which it is not necessary to express an opinion), the complaint wholly fails to state facts from which it appears that they were guilty of negligence as the result of their non-feasance. Merely alleging that they negligently failed to timber the place where plaintiff was employed was but the conclusion of the pleader, without stating the facts upon which such a conclusion was based. There is not an allegation, nor is there an averment, in the complaint from which it can be inferred, either directly or indirectly, that the defendant company had delegated to the individual defendants, or either of them, its duty to make the place safe where plaintiff was working by timbering or otherwise. If it was not their duty to make this place safe, then clearly the failure to do so did not give to plaintiff a right of action against them, because they had not violated any duty which by virtue of their employment they owed him.

We shall next consider paragraph 6 of the complaint, although counsel for plaintiff says, in his brief, that "No cause of action is urged against McKenzie for giving a negligent order or assurance to the plaintiff. Neither the order or the assurance are even alleged to have been negligent. The purpose of these averments was simply to ward off the defenses of

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assumed risk and contributory negligence, which might otherwise have appeared on the face of the complaint and made it demurrable." With this admission, we might decline to consider the paragraph further; but it is evident that if any cause of action is therein stated, either by itself or in connection with the other averments of the complaint, it is against McKenzie alone. It does not appear that he had any authority, by virtue of his employment, to determine whether the place in which plaintiff worked was safe, or that it was his duty to keep it in that condition. The company had not delegated to him the performance of any duties which it owed the plaintiff in these respects; so that he could not be held responsible for failure to fulfill a duty imposed upon him by his employer even if mere non-feasance would have made him personally liable to plaintiff.

Conceding, then, that a cause of action is stated against the company for failure to properly timber the mine, and that a cause of action is also stated against McKenzie as the result of his acts under consideration, neither is responsible for the alleged wrong of the other. Each stands on independent ground. In order to maintain an action against several defendants for a tort it is essential that the wrong complained of was caused by their joint action. Persons are not jointly liable for a tort merely because they have some connection with it. It is not sufficient that the injured party has, on certain grounds, a cause of action against one for a physical tort, and has, on entirely different grounds, a cause of action against another for the same tort. There must be something more than the existence of two separate causes of action for the same act, to enable him to join the two parties liable in a single action. In brief, the injury must, in some sense, be their joint work before a joint action can be maintained.—*Keyes v. L., Y. G. W. & W. Co.*, 53 Calif. 724;

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Bliss on Code Pleading, § 83; Pomeroy's Code Remedies, § 308; *Selick v. Hall*, 47 Conn., 260.

In as much, then, as the company and McKenzie could not be joined in the action, it necessarily follows that, although a cause of action may be stated against each, they must be determined independently of each other, and are, therefore, separable. We conclude, then, that the petition for removal should have been granted, because it appears that the defendant company is a citizen of the Kingdom of Great Britain; that plaintiff and his next friend are residents of the state of Colorado; that the individual defendants, although residents of the state, are sham and fictitious; that a cause of action is not stated against either of them; or, if one is stated, it is against McKenzie only, for which the company is in no wise liable, neither is he liable for the alleged negligence of the defendant company.

We have not discussed or considered the proposition urged by counsel for the Mining Company, that, according to the averments of the petition for removal, an issue of fact was tendered, to the effect that the resident defendants were fraudulently joined as a mere pretense and device to oust the jurisdiction of the federal court, in that as a matter of fact, plaintiff had no cause of action against such defendants, or either of them, and did not intend to prove any of the acts of negligence alleged against them, or to prosecute his alleged cause of action against either of these parties, and that, therefore, the case should have been transferred to the federal court for the trial of this issue, for the reason that, under the view we take of the case, it is not necessary. Of course, if the petition does tender such an issue, then the case was removable for that reason alone, independent of the other grounds upon which the mining company based its right to a removal.

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The case of *The Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, is cited by counsel for plaintiff in support of his contention that under the allegations of the complaint the cause was not removable. In that case the only question presented for determination and passed upon, was, whether a separable controversy appeared on the face of plaintiff's petition or declaration. Dixon was crossing the tracks of the railroad company on a public highway, and was run over by a train. The engineer and fireman in charge of the train were joined as defendants in a suit against the railroad company. The court of appeals of Kentucky had affirmed the judgment of the state trial court denying the application of the railroad company to remove the cause to the federal court, based upon the ground that according to the averments of the complaint, the negligence charged was joint and concurrent. The supreme court adopted this construction, and held that, under the averments of the complaint, it might be shown that the engineer and fireman had been guilty of active negligence in operating the train which caused the injury, by running it at an excessive rate of speed. Of course, on a showing of that kind all the defendants would be jointly liable. The company would be responsible for the negligence of its engineer and fireman in that respect, and in turn, they would also be liable for their active negligence in the premises. In the case at bar, however, negligence is not charged against the individual defendants, or, if it is charged against McKenzie, it appears that the company was not responsible therefor, neither was he liable for the alleged negligence of the corporation; so that the Dixon case is not applicable in any sense to the case under consideration.

The Stratton, Cripple Creek M. & D. Co. v. Ellison, 42 Colo. 498, is also cited by counsel for plaintiff, but it has no application to any proposition which we have

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determined in the case at bar. In the Ellison case the application for removal was based entirely upon the ground that a separable controversy existed between plaintiff and the two parties joined as defendants. It was determined (and very properly so), that this question must be determined solely from the complaint, which was held to state, from the facts alleged, joint and concurrent acts of negligence of the defendants. It should be observed, however, that the liability of an employe to third parties for mere non-feasance was neither considered nor discussed. The distinguishing feature between the Dixon and Ellison cases, and the one at bar, is, that in these cases it was held that on the face of the respective complaints the facts alleged charged joint and concurrent negligence on the part of the defendants, which is not true of the complaint in the case under consideration. It should also be noted that those cases do not hold that an allegation of joint and concurrent negligence only, states a joint cause of action.

On behalf of plaintiff counsel contends that the petition for removal is insufficient and should not be considered, because it does not present an issuable fact, and that conclusions of law are merely stated, instead of the facts upon which the grounds for removal are based. The proposition is not applicable. Where, as in the case at bar, the complaint to which the petition for removal is directed shows upon its face that grounds for removal stated in the petition exist, it is not necessary to repeat in the petition the facts so disclosed by the complaint.—*Boatmen's Bank v. Fritzlen*, 135 Fed. 650.

It is also urged by counsel for plaintiff that the petition for removal should not be considered because it is not incorporated in the bill of exceptions, nor was any exceptions saved to the ruling of the trial court in refusing it.

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Counsel for defendant company contend that under the provisions of our code, it is unnecessary to bring into the record, by bill of exceptions, the petition for removal. It is not necessary to determine this question. The supreme court of the United States has directly decided that the petition and bond for removal, when presented to a state court, as well as the order thereon, are a part of the record in the cause, or must be considered on review without regard to what the code provisions of the state may be defining what constitutes the record proper.—*Penn. Co. v. Bender*, 148 U. S. 255; *Kanouse v. Martin*, 15 How. 198; See, also, *Insurance Co. v. Pechner*, 95 U. S. 183; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199; *Bur., C. R. & M. Ry. Co. v. Dunn*, 122 U. S. 513; *Crehore v. O. & M. Ry. Co.*, 131 U. S. 240; *Donovan v. Wells-Fargo Co.*, 169 Fed. 363; *Delashmutt v. C., B. & Q. Ry. Co.*, 126 N. W. (Iowa) 359.

When, by a petition for removal duly presented, accompanied by the requisite bond, which is approved, a removable cause is disclosed, the jurisdiction of the state court ceases, and the jurisdiction of the proper federal court at once attaches. The authority of the state court is then limited to an order transferring the cause. All other proceedings by the state court are *coram non judice*, unless its jurisdiction is restored.—*Steamship Co. v. Tugman*, 106 U. S. 118; *Postal T. & C. Co. v. So. Ry. Co.*, 88 Fed. 803; *Boatmen's Bank v. Fritzlen, supra.*

In other words, if the petition for removal, read in the light of the pleadings in the case, shows a removable cause, and the bond tendered is sufficient, the cause is removed, without reference to the action of the state court; consequently, an exception to the order denying a petition to remove in such circumstances is not necessary.—*Shohoney v. Quincy, O. & K. C. Ry. Co.*, 122

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S. W. (Mo.) 1025; *L. R., M. R. & T. Ry. Co. v. Iredell*, 50 Ark. 388.

The constitution of the United States and the acts of congress have granted to a defendant when sued in a state court of a state of which he is not a citizen, by a citizen of the state in which the action is brought, the right to remove the cause to a federal court. It is the duty of the state courts to fully protect these rights, without regard to what the real merits of the controversy may be. Those are matters which the non-resident has the absolute right, in a proper case, to have tried and determined in the federal court. The plaintiff can not deprive him of this right by joining as defendants those whom the complaint discloses have no interest whatever in the subject matter of controversy, or are sham and fictitious.

In discussing and determining this case, it will be borne in mind that we have done so without regard to the employers' liability act, for the reason that it is not involved.

The judgment of the district court is reversed and the cause remanded, with directions to transfer the cause to the circuit court of the United States for the District of Colorado, as prayed for by the defendant company in its petition for removal.

Reversed and remanded with directions.

Decision *en banc*.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL dissent.

ON PETITION FOR REHEARING.

Mr. JUSTICE GABBERT delivered the opinion of the court.

In the petition for removal it is alleged, in substance, that the facts alleged in the complaint do not

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constitute joint and concurring negligence upon the part of the Mining Company, and the resident defendants, and that the latter are sham and fictitious, and were fraudulently joined with the Mining Company for the purpose of presenting the removal of the cause to the federal court. We have determined that the cause should have been removed upon the ground that the joinder of the resident defendants was fraudulent, and that they were sham and fictitious because no cause of action was stated against them or either of them for which the company is responsible. This, it is claimed, is erroneous, for the reason that plaintiff having elected to sue the parties jointly in tort, the failure to state a joint cause of action against the Mining Company and the resident defendants does not render the cause removable.

In support of this contention two propositions are advanced. First: That a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint, or that, even though the joinder may not have been proper, a severable controversy between the plaintiff and the Mining Company is not presented, when the plaintiff has elected to sue all jointly; and, second, that the joinder of resident defendants against whom no cause of action is stated, is not a fraudulent joinder. In brief, these propositions are, that a failure to state a cause of action against the resident defendants is not alone ground for removal, and a separable controversy apparent on its face is not alone ground for removal. In support of these propositions, the following cases are cited: *Ches. & O. Ry. Co. v. Dixon*, 179 U. S. 131; *Alabama-Gt. So. Ry. Co. v. Thompson*, 200 U. S. 206; *Cin., N. O. & T. P. Ry. Co. v. Bohon, ibid.* 221; *Ill. Central R. R. Co. v. Sheegog*, 215 U. S. 308.

All of these cases determine, so far as any question is involved in the present case, that where a plain-

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tiff sues a non-resident corporation in a state court, joining therein the servants of such corporation, residents of the state, with plaintiff, and states a joint cause of action in his complaint, a severable controversy is not presented on the face of that pleading. This is not a new rule. On the contrary, the rule has always been, that if from the averments of the complaint filed in the state court, it appears that under the laws of the state where the action is commenced, or the decisions of its highest court, a joint cause of action is stated against the non-resident and resident defendants, the cause is not removable upon the ground of severable controversy alone. In none of the above cases was it charged that the joinder of the resident was fraudulent except in the Sheegog case; but in that case it was determined that a joint cause of action against the defendants was stated, but that the averments in the petition for removal upon the ground that the joinder was fraudulent, were insufficient. That in considering the question of the right of removal in these cases the court had in mind that a claim that the joinder was fraudulent would be material, is evident from the statement in the Dixon case, to the effect that the petition for removal did not charge fraud, and that in the Thompson case the court used this significant language:

"It is to be remembered that we are not now dealing with joinders, which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts with a view to defeat federal jurisdiction. In such cases entirely different questions arise, and the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the federal courts of the protection of their rights in those tribunals."

So that these cases in no sense change the rule

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with respect to removal of causes based upon the ground of fraudulent joinder.

In the case at bar the charge is made that the individual defendants were fraudulently joined for the purpose of preventing a removal of the cause to the federal court. Where the fact is patent upon the face of the pleadings and record in a suit that an improper party has been joined, or a sham cause of action has been injected into the case for the sole purpose of defeating the jurisdiction of the federal court, the court may find the attempt to defeat the jurisdiction of the federal court from the record alone, and prevent its perpetration. We have determined that a joint cause of action is not stated against the Mining Company and the individual defendants. Unquestionably a plaintiff may join parties defendant for the sole purpose of preventing removal, if he has a joint cause of action; but where he sues parties jointly, and wholly fails to state a joint cause of action, it being evident from the complaint itself that the reason the resident defendants were joined was to prevent a removal, and that a sham cause of action was injected into the case for this sole purpose, this is sufficient upon which to base the conclusion, when the petition for removal presents it, that the joinder was fraudulent.—*Reinartson v. Chi. & Gt. W. Ry. Co.*, 174 Fed. 707; *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. 745; *Floyt v. Shenango Furnace Co.*, 186 Fed. 539.

The petition for rehearing is denied.

Rehearing denied.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL dissent.

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[No. 7272.]

CHEMGAS v. TYNAN, WARDEN OF THE PENITENTIARY.

HABEAS CORPUS—*Conviction Merely Erroneous*—The omission from a criminal information, otherwise above exception, of the concluding phrase "and against the peace and dignity of the same," goes to matter of form, and in no degree impairs the jurisdiction of the court—(37).

One convicted upon such information will not be discharged on *habeas corpus*—(38).

Original application for writ of habeas corpus.

Petitioner John Chemgas, alleges that he was unlawfully convicted in the district court of the city and county of Denver, and sentenced to the penitentiary on the following information:

"STATE OF COLORADO,
CITY AND COUNTY OF DENVER. } ss.

In the District Court, Second Judicial District.

THE PEOPLE OF THE STATE OF COLORADO

v.

PETER HORONS & JOHN CHEMGAS.

Comes now Willis V. Elliott, district attorney within and for the second judicial district in the state of Colorado and in the name and by the authority of the People of the State of Colorado informs the court and gives the court to understand that Peter Horons & John Chemgas on, to wit, the 10th day of January, A. D. 1909, at the city and county of Denver, and state of Colorado then and there being male persons over the age of fourteen years, in and upon one, Ralph I. Frost, a male person over the age of fourteen years and then and there being, feloniously, did make an assault, and then and there feloniously, wickedly, diabolically, and against the order of nature, had a venereal affair with

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and carnally knew the said Ralph I. Frost.

WILLIS V. ELLIOTT,
District Attorney."

That his arrest, trial, conviction and imprisonment are void because the information is in conflict with section 30, Article VI. of the constitution, in that it does not conclude: "Against the peace and dignity of the same."

The return of the warden admits that he holds petitioner by virtue of a mittimus based upon said trial, and that the petition contains a true transcript of the record of said trial and conviction.

Petitioner moves to be discharged upon said return.

Section 30, article VI. of the constitution, reads: All process shall run in the name of "The People of the State of Colorado"; all prosecutions shall be carried on in the name and by the authority of "The People of the State of Colorado," and conclude, "against the peace and dignity of the same."

Section 1956 Rev. Stats. provides: All exceptions which go merely to the form of the information shall be made before trial, and no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged.

Section 1960 provides: The information shall be sufficient if it can be understood therefrom: 1. That it is presented by the person authorized by law to prosecute the offense. 2. That the defendant is named therein, or described as a person whose name is unknown to the informant. 3. That the offense was committed within the jurisdiction of the court or is triable therein. 4. That the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case.

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Section 2919, upon habeas corpus, provides: If it appear that the person is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes: First—Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person.

* * * *

Seventh—Where there is no general law, nor any judgment, order or decree of a court to authorize the process, if in a civil suit, nor any conviction, if in a criminal proceeding.

Messrs. TAPP & DEWEESE and Mr. ISHAM R. HOWZE, for petitioner.

Hon. JOHN T. BARNETT, Attorney General, Hon. BENJAMIN GRIFFITH, Attorney General, Mr. A. A. LEE, Mr. ELMER L. BROCK, Mr. GEORGE H. THORNE and Mr. EUGENE A. MORAN, for respondent.

MR. JUSTICE GARRIGUES delivered the opinion of the court.

This is a collateral attack upon the judgment of the district court. If the court had jurisdiction to pronounce judgment, it cannot be reviewed on *habeas corpus*. If the court had no jurisdiction to pronounce the same, it may be disregarded on *habeas corpus*. After conviction, however illegal or erroneous, if the court acted within its jurisdiction, the judgment can not be set aside on *habeas corpus*. This principle of collateral attack, runs through both the civil and criminal law.

The contention of the petitioner is, that the complaint charges no offense; hence it is a void proceeding, and the court exceeded the limit of its jurisdiction in pronouncing judgment.

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Prosecutions were formerly conducted in the name of the crown; under our changed conditions they are conducted in the name of the people. This prosecution is in the name of and by the authority of the people of the state. The complaint sufficiently informs the defendant that he is prosecuted by the state. It states fully the nature and character of the offense, and that the transaction occurred in the city and county of Denver, Colorado. The omitted phrase, "against the peace and dignity of the same," is a legal conclusion, not entering into the charging part of the complaint. The court had jurisdiction over the offense charged and over the person of the defendant, and was not robbed of its jurisdiction by the complaint failing to inform him of the legal conclusion that buggery is a crime against the peace and dignity of the people of the state of Colorado. The information is faulty because of this omission, but the district court was not without jurisdiction to pass upon this defect. The facts stated in the information constituted a public offense known to the laws of Colorado sufficient to confer jurisdiction upon the district court. What it should have done, had its attention been called to this omission, or because this court would reverse the case on error, cannot avail the defendant in this proceeding. Counsel neglected to avail himself of a motion to quash, or in arrest of judgment, and failed to have the case reviewed here on error. He has waited until petitioner is serving his sentence in the penitentiary, and now seeks in this collateral proceeding to raise this point for the first time. We do not think that the decisions of this court permit it to be done, unless the information is so drawn as to charge no offense whatever.—*Frisbie v. U. S.* 157 U. S. 168; *Ex parte Cain,* 120 S. W. 999; *Caples v. State,* 3 Okla. Crim. 72, 104 Pac. 493; *State v. Kirkman,* 104 N. C. 911, 10 S. E. 312; *State v. Peters,* 107 N. C. 876, 12

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S. E. 74; *People v. District Court*, 26 Colo. 380; *People v. District Court*, 33 Colo. 328.

The motion to discharge the petitioner on the return will be denied, and he is remanded to the custody of the warden of the penitentiary. *Motion denied.*

Decision *en banc.*

CHIEF JUSTICE CAMPBELL, Mr. JUSTICE BAILEY and Mr. JUSTICE GABBERT, concur.

Mr. JUSTICE WHITE, Mr. JUSTICE MUSSER and Mr. JUSTICE HILL, dissent.

Mr. JUSTICE WHITE, dissenting:

The writ of *habeas corpus* does not perform the office of a writ of error, and the remedy thereby, is limited to cases in which the judgment or sentence attacked is void. Nevertheless, if the petitioner be imprisoned under a judgment of a court which had no jurisdiction of the person or the subject matter, or authority to render the judgment complained of, or exceeded its jurisdiction in the premises, relief should be accorded under the writ. In such cases the judgment is void. Such is the principle announced by the great weight of authority.—Hurd on Habeas Corpus, (2d ed.) pp. 324, 327; *Re Lane*, 135 U. S. 443; *Re Tyler*, 149 U. S. 164; *Re Swan*, 150 U. S. 637.

Moreover, it is the law in this state by express terms of the statute. Section 2919 Rev. St., pertaining to practice under the writ of *habeas corpus*, declares, that "If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes: First—Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person."

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Whenever a constitutional requirement in criminal procedure—not merely a constitutional privilege—has been wholly disregarded, and is not in substance found in the very instrument that authorizes the court to act, the orders and judgments of the court in that particular case, are necessarily void. Though the court may have possession of the person and general jurisdiction of the alleged crime, yet in that particular case it has not jurisdiction thereof, because an express provision of the constitution, "which bounds and limits all jurisdiction," has been wholly disregarded.

In *Re Nielsen*, 131 U. S. 176, the supreme court of the United States announced the doctrine, that a petitioner should be released on habeas corpus, if the record disclosed that he had, on the trial in the lower court, been denied a constitutional right. The syllabus is as follows: "Where a court is without authority to pass a particular sentence, such sentence is void, and the defendant imprisoned under it may be discharged on *habeas corpus*. A judgment in a criminal case, denying to the prisoner a constitutional right, or inflicting an unconstitutional penalty, is void, and he may be discharged on *habeas corpus*." In the opinion, p. 184, in speaking of the holding in *Re Snow*, 120 U. S. 274, it is said: "The court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte Siebold*, 100 U. S. 371, 375, and is illustrated by the case of *Ex parte Parks*, as compared with the cases of Lange and Snow. In the

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case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner." And further in the same case it is said: "If we have seemed to hold the contrary in any case, it has been from inadvertence. * * * In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the constitution, which bounds and limits all jurisdiction."

In the case of *Ex parte Bain*, 121 U. S. 1, a demurrer was interposed to the indictment, and the court permitted the United States attorney to strike out certain words therein, holding that they were surplusage. After conviction, the defendant applied to the supreme court of the United States, for a writ of *habeas corpus*, upon the ground, that the judgment and sentence were void, for the reason that he was tried without a proper indictment. In the opinion discharging the petitioner the court, on page 13, said: "It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or

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prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed, or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear the evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange,* 18 Wall. 163; *Ex parte Parks,* 93 U. S. 18; *Ex parte Wilson,* 114 U. S. 417, and other cases."

A court derives its jurisdiction from the law of the land, and until the forms thereby prescribed, essential to jurisdiction, are substantially complied with, no power to proceed in any particular matter is vested in any of our courts, and none can be exercised under our form of government. The constitution is the basis of our government, and procedure in direct conflict therewith, or in substantial disregard thereof, must necessarily be a nullity. Before a court can lawfully

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hear and adjudge in a criminal case, there must be a prosecution. The first essential step, in a prosecution for the commission of crimes of the character of the one under consideration, is an indictment, or an information. Const. Art. II, § 8; Rev. St. § 1957. No court of this state has authority to try a prisoner held for the commission of a felony, until he is so formally charged in such court. The question is a jurisdictional one, and without an indictment or information, the prisoner is entitled to be discharged on *habeas corpus.* —*Ex parte Wilson, supra; Ex parte Bain, supra.*

It matters not what the general powers and jurisdiction of a court may be, if it acts without authority in the particular case, its judgment and orders are mere nullities—not voidable, but simply void—protecting no one acting under them and constituting no hindrance to the prosecution of any right.

The paper signed by the district attorney and purporting to inform the court of the commission of the alleged offense by the defendant, is, in the majority opinion, called an information. This court is not concerned with, or bound by the names by which pleadings are designated. In every pleading there must be certain essential allegations to constitute it such. By constitutional mandate "all prosecutions shall be carried on in the name and by the authority of 'The People of the State of Colorado,' and conclude 'Against the peace and dignity of the same.' " Const. Art. VI, § 30. The alleged information in this case not only fails to conclude as required by the constitution, but such essential words are nowhere found therein. It is said, that "the omitted phrase 'Against the peace and dignity of the same' is a legal conclusion not entering into the charging part of the complaint." I cannot agree. In one sense the constitutional requirement may be matter of form. Nevertheless, by virtue of the fact, that it is a part of the constitution, it is likewise matter

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of substance. Courts, which are creatures of the constitution and the law thereunder, have no authority to dispense with that which the constitution requires. For if it be once held that courts can dispense with any portion of the constitutional requirements, then there is no limit upon the power of the courts in that respect. They may dispense with the entire constitution.

It will be observed that the information before us contains no allegation whatever, no certainty, as to what sovereign has been offended. Within the territory there were, at least, two sovereign powers exercising jurisdiction—the federal and the state. It matters not that we know that the former does not possess, and the latter does possess authority to punish for offenses of the character of that attempted to be charged herein.

It is written in our constitution, that no person shall be deprived of his liberty "without due process of law"; it is likewise declared therein, that "all prosecutions shall be carried on in the name and by the authority of 'The People of the State of Colorado,' and conclude 'against the peace and dignity of the same.'" That instrument further declares, that prosecutions, in the courts, for felonies, shall only be upon indictment or information. Thus we have the express mandate of the constitution that an indictment or an information for a felony shall have therein the very words lacking in the information before us.

In *Cox v. State,* 8 Tex. Ct. App. 254, 34 Amer. Rep., 746, after declaring that by § 12 of Art. V of the Texas constitution, "all prosecutions shall be carried on in the name and by the authority of 'The State of Texas,' and conclude 'against the peace and dignity of the state,'" and pointing out that the indictment under consideration did not conclude "against the peace

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and dignity of the state," the court says: "that whilst the constitutional requirement is, critically speaking, matter of form, it is also nevertheless matter of substance by virtue of the fact that it is part of the constitution, no declaratory portion of which are the courts empowered with authority to declare only formal when the language is positive and unambiguous. However much we may feel disposed to consider a matter prescribed by the constitution ill-advised or useless—however much we may be inclined to doubt the propriety of inserting into the organic, fundamental law of the state requisites of forms with regard to procedure and practice in the courts—the answer is, the people themselves, the source of all power and authority in a republican government, have spoken it, and with regard to their *ipse dixit*, when contained in the constitution, which is but the expression of their sovereign will, the courts can only bow in humble obedience and say *'ita est scripta.'* If plain and unambiguous, no ordinary rules of construction are applicable to these expressions; their inherent, binding authority is superior to all ordinary rules. As was said by Mr. Justice Emmet, and concurred in by Judge Cooley: 'It will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory and not imperative.' *People v. Lawrence*, 36 Barb. 186; Cooley's Const. Lim. (3d ed.) 82."

In *Rice v. State*, 3 Heisk. (Tenn.) 215, 230, it was said, that an indictment "that does not conclude 'against the peace and dignity of the state,' is a nullity. It is a positive injunction of the constitution itself, that such shall be the conclusion of every indictment. It is, therefore, a matter that can not be affected by legislation, and a defect that cannot be ignored by the courts. An indictment without these words is not an accusation of crime, and not an indictment in the sense of the constitution. No conviction upon such an

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indictment could be permitted to stand; and a prisoner can not waive his rights in this respect, as it is the imperative mandate of the constitution, that all crimes shall be prosecuted by presentment or indictment, and that all indictments shall conclude, 'against the peace and dignity of the state.' "

Mr. Bishop in his work, New Criminal Procedure (4th ed.), vol. 1, § 651, sub. 4, after reviewing many cases upon the question now under consideration, says: "The rule derivable from all, and from the analogies of the law, would seem to be that unimportant words omitted from the constitutional form of the conclusion, or changed therein, will not necessarily vitiate it; but whatever alters the substance, even in what seems unimportant, will render it void." After stating that the requirement, that prosecutions "shall be carried on in the name and by the authority of the state," is held by some courts to be sufficiently complied with if the record shows it in any form, and by others to be merely directory, the author continues in § 652a, sub. 1, as follows: "The other provision—namely, as to the conclusion—has often, and it appears always, been interpreted as mandatory; even, by some or all opinions, to the extent that it can not be waived by the defendant."

In *Williams v. State*, 27 Wis. 402, 403, it is said: "The constitution provides, that 'all indictments shall conclude against the peace and dignity of the state.' This mandate is imperative, and an indictment which does not so conclude is necessarily bad. The courts have no authority to dispense with that which the constitution requires."

I believe I am warranted in saying that all the authorities agree that when the constitution of a state requires an indictment or information to conclude in certain forms and words, the instrument not so concluding, either exactly or substantially, is void. Some of the

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cases say that it is void; some that it is insufficient to support a conviction; others that it is mandatory and the courts must enforce it; and still others that "the courts have no authority to dispense with that which the constitution requires." The effect of the language of all is, that the omission of the required constitutional words renders the instrument void.—*Smith v. State*, 120 Ala. 115; *State v. Dycer*, 85 Md. 246, 252; *State v. Durst*, 7 Tex. 74; *Wallace Thompson v. State*, 15 Tex. App. 39; *R. Thompson v. State*, 15 Tex. App. 168; *Lemons v. People*, 4 W. Va. 755; *Thompson v. Commonwealth*, 20 Gratt. 724; *Nichols v. State*, 35 Wis. 308, 311; *State v. Waters*, 1 Mo. App. 7; *State v. Lopez*, 19 Mo. 254; *State v. Pemberton*, 30 Mo. 376; *State v. Stacy*, 103 Mo. 11; *State v. Campbell*, 210 Mo. 202.

The same doctrine is announced in the Encyc. of Pleading and Practice, vol. 10, p. 441; in the 10 Amer. & Eng. Encyc. of Law, (1st ed.) 514, and 22 Cyc. 243, 244.

The rule does not obtain, though sanctioned by long usage, unless required by constitutional provision. *Bolin v. State*, 71 N. W. (Neb.), 444, 446.

In *Cox v. State, supra*, the court expressed its belief that it had consulted every accessible case in the United States wherein the question had been reviewed, and had found but two cases—that of *Cain v. State*, 7 Blackf. 612, (4 Blackf. 512), and *Commonwealth v. Paxton*, Ct. of Quar. Sess. of Chester County, Penna., published in the Legal Intelligencer, November 14, 1879,—where such defects were held mere matters of form.

I have examined *Cain v. State*, referred to in *Cox v. State, supra*, and find the case in 4 Blackf. 512, instead of 7 Blackf. 612. The indictment there under consideration concluded, "against the peace of the state." The prosecuting attorney was permitted to amend it so as to read, "against the peace and dignity of the state."

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In the opinion it is said: "The indictment, as it was returned, was undoubtedly insufficient; but the question is, whether the Court was authorized to amend it, so as to make the conclusion of the indictment conform to the requisition of the constitution? There is no doubt but that the court, by the consent of the grand jury, may amend indictments in matters of form." And further in the same opinion it is pointed out, that the constitution does not require that the conclusion, required in all indictments, be found by the grand jury. The act of the court in permitting the amendment, under the circumstances, was upheld. I have been unable to secure *Commonwealth v. Paxton,* but find it cited in vol. 3, Brightly's Digest to Pennsylvania Reports, from which it appears that in the indictment, under consideration in that case, were several counts. Only the last count concluded with the words "against the peace and the dignity of the Commonwealth of Pennsylvania." It was held, "the insertion of these words in the last count of an indictment, is sufficient, though omitted in others."

In some of the authorities the question was presented on writ of error or appeal, and not by *habeas corpus,* yet in all it is in effect held, that the failure to substantially comply with the requirement, renders the indictment or information void, not voidable. If the indictment or information is void, all proceedings founded thereon are equally worthless. Because one's rights, injuriously affected by a void judgment, may be protected by a writ of error does not preclude such person from securing relief by *habeas corpus.* "Conviction without authority of law is unwarranted, and will justify a discharge on *habeas corpus.*"—Amer. & Eng. Encyc. of Law, vol. 9, p. 214; Church on Habeas Corpus, § 370.

In the majority opinion it is pointed out, that defendant failed to avail himself of a motion to quash, or

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in arrest of judgment, and failed to have the case reviewed on error, and apparently certain sections of the statute are cited to support the implied conclusion, that thereby the defendant waived his rights in that respect. When the constitution of the state provides how an indictment or information shall conclude—that is, prescribes the particular words of conclusion—they must be substantially written therein before the instrument called an information or indictment is such. The defendant can not waive such requirement. The legislature, which is the creature of the constitution, can not dispense with it. It is not a personal privilege, but a constitutional provision which must be substantially complied with in order to give a court jurisdiction to proceed in the particular case. In fact, it is the right of society to have its fundamental and supreme law complied with, and its substantial observance, is essential in distinguishing the power of the court from the power of the mob. To hold that a court can adjudge in a particular case, that there is an indictment or information before it, vesting in the court jurisdiction of the matter alleged, and of the person charged, and commit such person to prison, and that the person so sentenced can not be relieved therefrom on habeas corpus when the alleged indictment or information is lacking in an allegation which the constitution says shall be in all indictments or informations, is, in effect, to hold, that the court is vested with both judicial and legislative power—that it can prescribe the rules giving it jurisdiction, change them when and in any particular it pleases, and proceed in all respects without regard to the law of the land. This can not be. The declaration written into Magna Charta that "No freeman shall be taken or imprisoned, * * * nor will we pass upon him, nor will we send upon him, unless * * * by the law of the land," became, and is a basic principle of our government, and is as binding a prohibition and

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limitation upon the state, as it was upon the king, who was forced to recognize and concede it as a necessary protection to the rights of free men.

I am persuaded that the cases cited in the majority opinion have no application to the matters here involved. *Frisbie v. U. S.* 157 U. S., 160, 168, holds, that it is unnecessary that a count in an indictment should conclude that the offense was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States." It is sufficient to say that the Constitution of he United States does not require that indictments or prosecutions shall so conclude. Moreover, the common law is not in force in the United States, and that government has no common law jurisdiction, so the requirements thereof need not be observed. Furthermore, it is pointed out in the opinion that under the rule of § 1025 Rev. St. such conclusion is unnecessary. Not having been required by constitutional provision, the Congress or lawmaking power had authority to act in the premises and declare what the rules should be.

Ex parte Cain, 120 S. W. 999, does no more than announce the familiar rule, that a writ of habeas corpus is not available to affect the purpose of appeal, certiorari or supersedeas. Moreover, the question involved was the constitutionality of an ordinance, and the defendant had not yet been tried. In *Caples v. State*, 3 Okla. Crim. 72; 104 Pac. 493, the objection was, that the information was styled *"State of Oklahoma," plaintiff, v. W. T. Caples, defendant,* instead of *"The State of Oklahoma,"* etc., and that the prosecution was not carried on in the name and by the authority of the state of Oklahoma as provided by § 19, Art. VII. of its constitution which is as follows: "The style of all writs and process shall be: 'The State of Oklahoma.' All prosecutions shall be carried on 'in the name and by the authority of the state of Oklahoma.' All indict-

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ments, information and complaints shall conclude: 'Against the peace and dignity of the state.'" In overruling the objection, the court says, on page 80 of the Oklahoma Report, "An information is not a writ or process; it is an accusation upon which writs and processes issue. * * * * This is supported by a great array of authorities. So this clause of the constitution clearly does not require an information to begin with 'The State of Oklahoma.' It is true that the constitution requires that 'All prosecutions shall be carried on in the name and by the authority of the state of Oklahoma,' but it is nowhere required that this allegation shall appear in the information or indictment." In the case at bar the omitted language is, by the constitution, expressly required to be in the information.

State v. Kirkham, 104 N. C. 911, and *State v. Peters*, 107 N. C. 876, instead of being authority for the conclusions reached in the majority opinion, clearly support the rule for which I contend. Those cases arose under the constitution of that state adopted in 1868. On page 911 of the opinion in the Kirkham case, it is said:

"In our Constitution of 1776 it was provided that indictments should conclude, 'Against the peace and dignity of the state.'" On page 913 of the opinion, it is said:

"The constitution of 1868 omits this requirement," and further on the same page, "The omission in the present constitution of the requirement that indictments shall conclude, 'Against the peace and dignity of the state' was not made without a purpose."

People v. District Court, 26 Colo. 380, and *People v. District Court*, 33 Colo. 328, are likewise inapplicable. They arose upon the alleged unconstitutionality of a law or ordinance when the respective petitioners still had a remedy to test their constitutionality by writ of error, supersedeas or appeal. As I read the two Colorado cases, they hold, in effect, that when the petitioner

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wishes to attack a law or an ordinance as unconstitutional, he must do so directly by appeal or writ of error when either remedy is available. If neither of these remedies is available, an unconstitutional law may be attacked on habeas corpus under our own decisions. In *People v. District Court,* 26 Colo. 380, *supra,* the opinion on page 385, says: "In the exercise of our original jurisdiction we may properly, as we have recently done, determine on habeas corpus the constitutionality of a statute under which a person was convicted, if no other remedy exists; but we have always declined to exercise such jurisdiction, when adequate relief can be afforded by writ of error."

In the case at bar the remedy by writ of error does not seem to be open to petitioner. He sued out a writ of error and applied for supersedeas to this court. The supersedeas was denied and the writ of error subsequently dismissed. Petitioner thereafter made a motion to reinstate his writ of error, for the purpose of presenting the particular matter of which complaint is here made. This was denied. The only recourse he appears to have is to attack the information and the judgment thereon by habeas corpus, and I think the writ awarded should be sustained, and the petitioner relieved of the effect of the judgment and sentence.

I am authorized to state that Mr. JUSTICE MUSSER and Mr. JUSTICE HILL agree with my views as herein expressed.

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[No. 7324.]

HORONS V. TYNAN, WARDEN OF THE PENITENTIARY.

Case determined upon the authority of the last preceding case, Chemgas v. Tynan.

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS.

Messrs. TAPP & DEWEESE and Mr. ISHAM R. HOWZE for petitioner.

Hon. JOHN T. BARNETT, attorney general, HON. BENJAMIN GRIFFITH, attorney general, Mr. A. A. LEE and Mr. GEORGE H. THORNE, for respondent.

Mr. JUSTICE GARRIGUES delivered the opinion of the court.

For the reasons given in the case entitled, "In the Matter of the Application of John Chemgas for a Writ of Habeas Corpus. Thomas J. Tynan, Warden of the Colorado State Penitentiary, Respondent," No. 7272, decided at this term of the court, the petition will be denied.

Petition denied.

Decision *en banc.*

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[No. 5449.]

MOLLIE GIBSON CONSOLIDATED MINING AND MILLLNG COMPANY ET AL., V. MCNICHOLS ET AL.

FIXTURES—*Concentrating tables*, in a mill for dressing ores, secured to supports resting upon or attached to the foundation of the mill, and which are held in place by uprights firmly secured to the building, fed with water by pipes fastened to the building, and operated by machinery which is part of the mill, the tables being necessary to the complete and efficient character of the mill, as such, are parcel of the realty—(58, 59).

The manner in which the owners made return thereof to the assessor, for taxation, or that the assessor designated the machinery of the mill as personalty, is immaterial—(59).

And an agreement between the two mining corporations which erected in the mill, that either, ceasing to use it, may remove the machinery belonging to it exclusively, or, on certain conditions, machinery owned jointly, does not affect the question, until, at least, the stipulated condition has arrived—(59).

Appeal from Pitkin District Court—HON. JOHN T. SHUMATE, Judge.

Mr. WILLIAM O'BRIEN for appellants.

Mr. H. W. CLARK for appellees.

The appellants were the joint owners of a concentrating mill building and the machinery therein, which was used for concentrating the ores mined from their properties. The appellees were, respectively, treasurer and sheriff of Pitkin county. In his official capacity, the treasurer issued to the appellee Irving, as sheriff, a distraint warrant, commanding him to distrain the goods and chattels of the appellants for the amount of the tax assessed against their mill for the years 1900 and 1901. Under this warrant the sheriff seized twenty-seven Fru-Vanner concentrating tables in the mill, and caused notice of sale thereof to be posted. Appellants, as plaintiffs, then brought suit against appel-

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lees, to restrain the sale, alleging that the tables were fixtures attached to the land and mill building; that they were fastened to this building by heavy bolts or fastenings, and are, and were, a part of the mill, and therefore, could not be seized and sold as personal property. On application of the plaintiffs, a temporary restraining order issued, requiring the defendants to desist from selling or in any manner interfering with plaintiffs' possession of the tables. To the complaint the defendants filed an answer and cross-complaint. Plaintiffs answered the latter, to which the defendants replied; but it is not necessary to give a synopsis of these pleadings, as, by stipulation, the parties agreed at the trial that the question presented by the pleadings was, whether the tables were personal property or fixtures.

The schedules returned to the assessor with respect to the mill by The Mollie Gibson Company, which was the basis of the distraint warrant, showed the following: For the year 1900 it was headed: "The Mollie Gibson Argentum-Juniata Joint Mill," and was described as "Mill, including Machinery and Improvements." Opposite the word "Machinery" was written "$6500," and opposite "Improvements," "$5000." This was subsequently changed by the Board of Equalization by raising the valuation of the machinery two thousand dollars. For the year 1901 the schedule was headed as above and listed: "Mill, Machinery and Improvements," "$12,000.00." This was changed by the assessor by writing under the words "Mill, Machinery and Improvements," "Divided as follows:" "Machinery, $11,335" and "Improvements, $6665.00." In making out the assessment roll, it appears the assessor designated improvements as real estate, and the machinry as personal property.

It appears that the tables are set up and bolted or secured to supports resting upon, or attached to, foun-

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dations secured to the mill building proper, and are held in place by uprights, firmly secured to the building; that the pipes or other appliances carrying water to the tables, though not fastened to them, are fastened to parts of the building; that the power to operate the tables is transmitted from an overhead shaft or shafts, upon which pulleys are placed connecting with the pulleys on the tables by means of belts. In adjusting the tables, it is necessary at times to raise or lower them, and arrangements are made for this purpose. It also appears that the mill is used for concentrating ores, and that the tables are a part of the machinery placed therein for that purpose, which consists of various appliances, such as crushers, rolls, and the engine and boilers which supply the motive power. The mill was constructed jointly by the plaintiffs for the purpose of using it jointly in concentrating ores from their respective properties, and to this end they entered into a contract which, so far as material to consider, was as follows:

"Whereas, the said companies have jointly constructed a mill, known as "The Mollie Gibson-Argentum-Juniata Joint Mill," hereinafter called the "Joint Mill," for the concentration of ores mined, and to be mined, from the properties of said companies, or for custom account; and,

"Whereas, the said joint mill, as now constructed, has a nominal daily capacity of one hundred and fifty tons of ore, fifty tons of which capacity is reserved and intended for the use of the Gibson Company, exclusively, and one hundred tons thereof is reserved and intended for the use of the Argentum Company exclusively; and,

"Whereas, certain portions of said joint mill and machinery are to be, and must be, used jointly by the parties hereto, and certain other portions of the ma-

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chinery are reserved for the exclusive use for one or the other of the parties hereto; and,

"Whereas, the said joint mill, with its appurtenances, has, with the consent of the Gibson Company, been built upon a portion of the mining claims of said Gibson Company (here follows the description of such claims)."

The contract then makes provision for the enjoyment of certain easements, how expenses are to be borne for new machinery, and the operation of the plant, and then, for the purpose of fixing the rights of the parties in case one ceases to use the mill, or both cease to use it, makes the following provisions:

"Seventh: In case either of the parties hereto shall desire to cease operating and participating in construction or operation expenses of the joint mill, it shall have the right to do so, upon first giving ten days' notice of such intention, and, in that event, a rental of ten per cent. per annum shall be paid by the company continuing to operate for the use of the interest of the other in such portions as it may use the machinery and appliances, which are owned jointly by the parties hereto. The party continuing to operate shall bear all expenses of construction and operation." * * *

"Twelfth: In case either of the parties hereto cease all operations in the joint mill, the party continuing to operate shall have the right to rent the interest of the other in the joint property at a rental of ten per cent. per annum for as long a period as it continues to operate: but the party ceasing operations shall have the right to remove, sell or otherwise dispose of that portion of the machinery in the joint mill which is owned by it exclusively, providing such party is not in default to the other for any proportion of construction or operating expenses." * * *

"Sixteenth: This agreement shall cease and terminate upon the expiration of six months from the date

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of cessation of continuous working hereunder by both parties hereto, or in the event that work resumed by either of the parties hereto during said period of six months shall not be prosecuted continuously for at least three months. Upon termination of the contract as aforesaid, either party may, upon ten days' notice in writing to the other, remove all joint machinery and appliances, accounting to the other party for its interest therein."

Upon this synopsis of the testimony, which presents the material facts and regarding which there is no dispute, the court found that the tables were properly assessed and listed as personal property, and subject to be distrained as such for the taxes due upon personal property of the plaintiffs, as shown by the assessments for the years 1900 and 1901, and rendered judgment to the effect that the temporary injunction be dissolved, and the cause dismissed. Plaintiffs have appealed.

Mr. JUSTICE GABBERT delivered the opinion of the court.

When a building is erected for a particular purpose, and machinery placed therein reasonably necessary to effectuate that purpose, and in some substantial manner attached to such building, it becomes part of the realty. *Roseville A. M. Co. v. Iowa G. M. Co.*, 15 Colo. 29; *Farmers' L. & T. Co. v. Minn. E. & M. Co.*, 35 Minn. 543; *Symonds v. Harris*, 81 Am. Dec. 552; 51 Me. 14; *Laflin v. Griffiths*, 35 Barb. (N. Y.) 58; *Parsons v. Copeland*, 38 Me. 537; *Gray v. Holdship*, 17 Am. Dec. 680; 17 S. & R. 413.

Applying this test to the facts of the case at bar, we think it is clear that the Fru-Vanner tables were fixtures. The mill building certainly is real estate. It was constructed for the purpose of enclosing the machinery placed therein; without the machinery it would be useless as a mill for the reduction of ores. The pur-

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pose of the owners, in erecting the plant, which includes the building and the machinery, was to construct a concentrating plant. To render it suitable for the use designed, the tables were placed therein and fastened to the building in such manner, and to such an extent, as would render them adaptable to promote the ends for which the entire plant was constructed. To remove the tables would reduce the efficiency of the mill, if not entirely destroy it, just as much as to remove other distinct pieces of machinery therein, like the rolls, the crushers, or the motive power, all of which, and many other appliances, are essential and necessary to assemble, place, arrange and connect as a whole, in order to construct, complete and operate a plant for the reduction of ore.

The fact that the return to the assessor made on behalf of the owners stated valuations of improvements one sum, and machinery another, or that the mill, machinery and improvements were returned under one valuation, does not, when considered in the light of the fact that the machinery was unquestionably a part of the realty, establish that it was personal property; neither does the fact that the assessor designated the machinery upon the assessment roll as personal property cut any figure. His mistaken notion that the machinery was personal property, when, in fact, it was part of the real estate, cannot change the real situation or the real facts.

On behalf of the defendants much stress was laid upon the provisions of the contract between the plaintiffs, whereby the party ceasing to use the mill may remove the machinery belonging to it, exclusively, or, in case of the termination of the contract, either party, upon notice to the other, may remove all joint machinery, accounting to the other for its interest therein. These are merely provisions for the protection of the parties under certain contingencies, but the fact that

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either party may remove the machinery belonging to it exclusively, or the machinery owned jointly, does not make such machinery personal property until such time, at least, when, by the terms of the contract, the right to remove exists.

The judgment of the district court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion. *Reversed.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE HILL concur.

[No. 5626.]

THE PEOPLE EX REL. THE COLORADO BAR ASSOCIATION v. HUMBERT.

1. TRUSTEE—*Deposit of Trust Funds*—One who receives money to hold for another, should, if he places it in bank, deposit it as a trust fund, and not to his individual credit—(62).

2. ATTORNEY—*Misconduct*—An attorney who in a business transaction is guilty of conduct involving moral turpitude will be disbarred—(64).

The facts examined and respondent exonerated. Original proceedings in disbarment.

Mr. JOHN H. GABRIEL, for relator.

MR. THOMAS WARD, JR., for respondent.

Mr. JUSTICE WHITE delivered the opinion of the court:

The purpose of this suit is to have the name of respondent stricken from the roll of attorneys entitled to practice at the bar of this court. The information contains four separate charges of unprofessional conduct. No evidence was submitted in support of the sec-

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ond and third charge, and they are eliminated from consideration.

The allegations of the first are, substantially, that respondent, while attorney for one William Westlake in the prosecution of a divorce suit against the latter's wife, received of his client certain sums of money with the understanding that a certain amount thereof should be held by him until the divorce was granted, and thereupon turned over to Mrs. Westlake as alimony, and the balance to be likewise held and disposed of for court costs; that respondent failed and refused to pay the court costs, and likewise failed and refused to pay a considerable portion of the alimony due Mrs. Westlake. Respondent admits the employment, and the receipt of the money for the purposes alleged; claims that he entered into an agreement with Mrs. Westlake to retain the money and pay it over to her as she should desire; that he performed the contract and paid over the full amount, except $15.00, which he was ready and willing to pay whenever requested so to do by Mrs. Westlake.

The undisputed evidence shows that Mrs. Westlake and her agent, subsequent to the trial of the divorce suit, called upon respondent and demanded of him the money; that the latter then stated that he had deposited the money in a bank, and it had been levied upon or attached, and he was, therefore, unable to get it and could not then pay, but promised to do so within a few months, which seemed to be satisfactory to Mrs. Westlake. Thereafter, from time to time, respondent paid a portion of the amount, and, at the request of Mrs. Westlake, executed and delivered to her his note for $100.00 thereof, which she negotiated to a furniture company. Payments were made on this note so at the time of the institution of this suit, there was about $60. of the indebtedness still remaining unpaid. Mrs. Westlake testified that respondent had been paying her "according to the agreement made with him," and she be-

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lieved he would pay the balance in accordance therewith.

An examination of the entire evidence pertaining to this matter, fails to disclose any fraudulent or dishonorable intent on the part of the respondent. There was no deception, no untruthful statement concerning the matter. He frankly admitted that he had received the money. He asserted that he had deposited it in a bank where it had been attached, and he was unable to secure it. If respondent deposited the money in a bank, and the money was tied up or lost by attachment proceedings, and he was unable to have the money forthcoming, we do not think such misfortune constitutes a cause for disbarment. We think respondent should not have deposited the money other than as a trust fund. Moreover, he should have set forth in his answer that he had deposited the money and the facts concerning its loss, and at the hearing fully explained the matter by his own testimony. We can not, however, say that because he failed in these respects, he should be disbarred, when the evidence of petitioner shows that he gave a frank and reasonable explanation of the entire matter, and there was no evidence in any wise discrediting his explanation. Under these circumstances, we will presume that he spoke the truth. If his explanation was false, petitioner had ample opportunity to establish that fact.

The fourth cause grew out of an alleged sale by respondent of a certain diamond ring which he had received from one Dr. Spring as security for the payment of the latter's note. There is no pretence that respondent was acting in this transaction as attorney for Spring. The evidence was somewhat contradictory, yet the weight thereof establishes the fact, that Spring was owing respondent certain money, which the latter insisted should be paid at once, as he was under the necessity of raising a considerable sum to meet his own obli-

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gations; that Spring was unable to pay and voluntarily executed a new note, payable six months after its date, and gave respondent the ring, with the distinct understanding that the latter could use the ring, along with other jewelry, for the purpose of raising money thereon to meet his pressing obligations, Spring promising to have the money forthcomng in a very short time with which to redeem the ring. Spring failed in that respect and thereupon respondent pledged the ring under the authority previously delegated to him by Spring. Spring defaulted in payment of his note to respondent, and the latter defaulted in the payment of his notes to the party to whom he had pledged Spring's ring, together with other jewelry, and the person holding respondent's notes and Spring's ring assumed to foreclose the pledge and acquire ownership of the ring. Almost two years after Spring's default in the payment of his note, he made payment thereof to respondent, and the latter thereupon undertook to secure the ring again, but in this failed for the want of funds, though he apparently made some payments toward such purchase. Spring was under the necessity of, and did repurchase the ring at considerable outlay, and has never been reimbursed therefor by respondent.

At the time respondent parted with the ring he executed a bill of sale therefor, together with other jewelry, for an express consideration of approximately $189.00 and delivered the same, together with his promissory notes for a like amount, receiving in lieu thereof a like amount of money. Petitioner contends that the bill of sale was absolute, and that the alleged pledge was, in fact, a real sale. We are of the opinion that such meaning should not be ascribed to the transaction, but it properly should be held a pledge as hereinbefore stated. The very fact that the delivery of the jewelry, and bill of sale was accompanied by notes, is a strong circumstance supporting respondent's positive testi-

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mony that the transaction was a pledge and was so understood by all parties. While it is true, that if an attorney, in business transactions, is guilty of fraud, involving moral turptitude, his name should be stricken from the roll of attorneys—*People v. Sindlinger*, 28 Colo. 258—we are not prepared to say that the evidence and circumstances of this case bring respondent within the rule. The order to show cause is, therefore, set aside, and the proceedings dismissed.

Petition dismissed.

Decision *en banc.*

[No. 6007.]

THE DENVER CITY TRAMWAY COMPANY V. COWAN.

1. EVIDENCE — *Competency — Admissibility* — In an action against a street railway company, by a passenger, for negligently setting in sudden and rapid motion the car into which plaintiff was attempting to enter, throwing him to the ground, evidence of a similar accident and injury to another passenger attempting to enter the same train, only a few moments before the accident to plaintiff, and attributed to similar negligence and reckless conduct on the part of those in charge of the train, was held incompetent, as directed to immaterial matter and raising collateral issues, which the defendant might not be prepared to meet—(71).

2. ——*As to Damages—Variance*—Where, in an action for personal injuries, the plaintiff, both by pleading and bill of particulars describes his injuries with particularity, he is not to give evidence of injuries which are in no wise specified—(76).

Evidence that plaintiff since the injury, had been unable to attend to business was held properly admitted, as tending to show the extent of the injury, and its permanent character, even though the complaint made no claim for loss of time or interference with the plaintiff's business—(76, 77).

3. APPEALS—*Error Presumed Prejudicial*—Where incompetent evidence is permitted to go to the jury, over objections,

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the error is presumed prejudicial unless the contrary affirmatively appears—(74).

Evidence offered on the part of the plaintiff to establish the second cause of action in the complaint, was improperly received, without any restriction or limitation of it, by the court, to that particular cause of action. The evidence was of such character as to strongly influence the jury in considering the first cause of action. *Held*, that the withdrawal of the second cause of action did not cure the error—(73).

4. INSTRUCTIONS—*Negligence*—Particulars of negligence alleged, as to which there is no evidence, should be excluded from the consideration of the jury; but this may be effected by the general charge specifying what is to be determined by the jury.

An instruction which called the attention of the jury to particular negligences charged, as to which there was evidence, and told them that before they could find for the plaintiff, they must believe from a fair preponderance of the evidence, that the conditions enumerated resulted "solely from the negligence of the defendant" was held not improper, as excluding from the jury the question whether the act complained of was negligence—(80).

5. ——*As to Interest, of Party Testifying*—The interest of each and every witness in the subject matter of the litigation is to be considered by the jury in weighing his testimony, and it is the duty of the court to so instruct.

A general instruction, as to all witnesses, applies to the parties, and complies with the rule—(78).

6. ——*As to Damages*—In an action for personal injuries an instruction that the amount to be awarded, if the jury should find for the plaintiff, was "left to the enlightened judgment of the jury," that they were to consider plaintiff's expectancy of life, his physical pain, his mental suffering, the probability of its continuance, the nature and extent of the injury, as appearing in the evidence, and from all these determine what will be a fair compensation for the injuries sustained, was held to accord, substantially, with the instruction approved in *Denver Co. v. Martin*, 44 Colo. 324—(81).

Appeal from Denver District Court.—HON. FRANK T. JOHNSON, Judge.

Mr. GERALD HUGHES and Mr. HOWARD S. ROBERTSON, for appellant.

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Messrs. RICHARDSON & HAWKINS and Mr. STEPHEN W. RYAN, for appellee.

Mr. JUSTICE WHITE delivered the opinion of the court:

Appellee, as plaintiff below, sued the appellant and recovered judgment in damages for personal injuries sustained while attempting, as a passenger, to get upon a street car then owned and operated by the latter, upon the public streets of the city of Denver. From the judgment, the defendant company appeals.

The original complaint stated the facts as constituting one cause of action. A motion, interposed by defendant to "separate, and separately state the two alleged and pretended causes of action," was sustained, and thereupon appellee filed an amended complaint. Omitting the formal parts thereof, it is alleged, substantially, as a first cause of action, that plaintiff, desiring to board one of the cars of the defendant at Fifteenth and Platte streets, signaled an incoming car traveling along Fifteenth street; that the car, in obedience thereto, came to a stop; that thereupon plaintiff attempted to board the same, and as he was in the act of getting on, and before he could land, the car was suddenly and violently started by defendant, and thereby plaintiff was thrown therefrom across, over and upon the street, and by reason thereof his right clavicle was broken and contused, the flesh, muscles and tissues surrounding the same were greatly injured; the neck of the right femur was broken, and the flesh, muscles and tissues surrounding the same were greatly injured, lacerated and torn; his body was severely bruised, beaten and wounded, whereby and by reason of which he was compelled to, and did keep his bed for a period of twelve weeks, during which time he suffered immeasurable pain, anguish and distress, and was permanently injured and disabled:—and further,

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"That the said injuries occurred and were brought about wholly by reason of the negligence of the said company in each and every all and singular of the following particulars, to-wit:

a. That the said company should not have caused its said car to be started until this plaintiff had fully gotten onto the said car, and into a place of safety thereon.

b. That the said company should not have started its said car in any event so violently, hurriedly and rapidly as it did start the said car.

c. That the said car was started at a time and under the circumstances hereinbefore detailed in disregard of the safety of the lives and limbs of the passengers who were about to board said car and particularly of the life and limbs of said plaintiff.

d. That the servants of the said company who were responsible for the operation of said car were reckless, inexperienced, and inattentive to their duties, all of which was known to or in the exercise of reasonable diligence would have been known to said company.

e. That in trusting the said servants to operate the said car, the said defendant was guilty of neglect thereby endangering the lives and limbs of the passengers on said car, in the operation thereof, and particularly the life and limbs of this plaintiff."

The second cause of action, in its formal parts and in the alleged manner in which the accident occurred, was identical with the first, but particularized as follows:

"a. That the said company wantonly and recklessly caused its said car to be started before this plaintiff had fully gotten onto the said car and into a place of safety thereon.

b. That the said company started its car wantonly, recklessly, violently, hurriedly and so hastily and rapidly as to endanger the life and limbs of this plain-

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tiff by reason of which he suffered the injuries as aforesaid.

c. That the said car was started at a time and under circumstances showing a wanton and reckless disregard of the safety of the lives and limbs of the passengers who were about to board said car, and particularly of the life and the limbs of this plaintiff.

d. That the servants of the said company who were responsible for the operation of said car were reckless, inexperienced, and inattentive to their duties, all of which was known to or in the exercise of reasonable diligence would have been known to said company, and which it wantonly and willfully countenanced in continuing the said servants in its said employment.

e. That in trusting the said servants to operate the said car the said defendant was guilty of wanton and inexcusable neglect in endangering the lives and limbs of the passengers on said car in the reckless operation thereof and particularly the life and limbs of this plaintiff."

Upon motion of defendant, and order of the court thereon, the plaintiff filed a bill of particulars as to the portions of his body "bruised, beaten and wounded."

The defense interposed denied the alleged negligence of defendant, and the injury sustained by plaintiff, and pleaded contributory negligence on the part of the latter.

The evidence on behalf of plaintiff was to the effect, that the car came to a full stop in obedience to his signal, but before he had an opportunity to board the same, and while in the act thereof, the car started forward, and he was thrown to the pavement and received the injuries set forth in the complaint. That of defendant tended to show that the accident occurred while plaintiff was attempting to board a car which was in rapid motion, and which had not stopped, after crossing the intersecting street, where plaintiff attempted to get

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on. The court, in its instructions, dismissed the second cause of action, and directed the jury to confine itself to consideration of the first.

1. The first assignment of error argued, pertains to the reception of alleged improper evidence on behalf of plaintiff, and the rejection of alleged proper evidence offered on behalf of defendant.

A witness for plaintiff, was permitted to testify, over the objection and exception of defendant, concerning an accident which occurred to him a few minutes before the one in question. The substance of this testimony is, that on the evening of the accident, witness, for the purpose of taking a car into the city, went to the junction of Central and Fifteenth streets, which is one block west of the point where the accident to plaintiff occurred; that a car came to where he was waiting and stopped, and thereupon witness undertook to get upon the same, but before he could do so the conductor rang the bell, and the car started forward, with a jerk, and threw witness therefrom. Then the following question and answer: "Q. What became of you? A. I rolled off about fifteen feet to one side of the car. That is what became of me then and there."

The general rule is, that when a party is sued for damages arising from a particular act of negligence imputed to him, disconnected, though similar, negligent acts, are inadmissible. A different rule applies when the purpose of the evidence is to establish a previous and continuous defective or dangerous condition of a thing, and knowledge or notice thereof upon the part of the person sought to be charged, or, perhaps, when its purpose is to charge one with notice of another's incompetency, and probably, in a few other instances not necessary to notice here.—*Rio Grande Sn. R. R. Co. v. Campbell*, 44 Colo. 1; *Colo. Mtg. & In. Co. v. Rees*, 21 Colo. 435; *Last Chance M. & M. Co. v. Ames*, 23 Colo. 167, 173; *The T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo.

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App. 343, 351; Wigmore on Evidence, § § 199, 208, 250.

In Wigmore on Evidence, § 199, after stating that, "In a few jurisdictions the character of a defendant or of an employee or of a plaintiff for negligence or prudence may be uesd to show that he probably was not or was careful on a given occasion," the author puts the question: "Is it proper to evidence that character by particular instances of the trait?" and, after stating the argument negativing the proposition, proceeds, "For these reasons, almost all courts exclude such evidence, whatever their views may be * * * as to the propriety of using the character, if otherwise evidenced, to show the probability or improbability of carlessness on a particular occasion." The author then states the rule permitting the use of single acts for the purpose of establishing notice of incompetency, and proceeds: "This is not inconsistent with rejecting particular acts as evidence of the objective fact of incompetency."

In the case at bar, neither the condition of the car nor the incompetency of the servants is involved. The plaintiff could recover only by showing that the servants of defendants in charge of the car, were guilty of negligence, resulting in his injuries at the time and place alleged. The only way in which to establish such negligence was by showing that such servants, then and there, started the car without giving plaintiff sufficient time to safely board the same. Indeed, that is the only issue made by the pleadings or sought to be sustained by the evidence. If defendant's servants were not negligent at the time plaintiff sustained the injuries of which he complains, it was wholly immaterial how habitually and recklessly negligent they might have been prior thereto; or, if they were negligent then, how careful and prudent they had previously been. The incompetency of the servants, and notice thereof on the part of defend-

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ant, because of the nature of the case, were wholly immaterial, and the case must necessarily be determined under the general rule.

The irrelevancy, immateriality and prejudicial effect of the evidence in question is readily apparent. It presented collateral matters, drew away the minds of the jurors from the points in issue, and had a tendency to confuse and mislead them instead of informing them upon the direct issue they were to consider and pass upon. If such evidence be permissible, controversial proofs would necessarily be essential, and there would be as many collateral issues as there were separate accidents shown, and litigation, in any given case, would become interminable. Moreover, the defendant, unadvised of what particular alleged negligent acts might be presented, would be in no position to meet the same. Furthermore, if the jury believed that defendant's servants, at the intersection of the streets a block away, started the car before the witness had an opportunity to board the same, and caused him to be thrown therefrom, it would be a circumstance of great weight, and almost controlling force, in convincing them that such servants likewise so started the car at the place and time in question and caused plaintiff to be thrown. The cases hereinbefore cited, from our own courts, sustain the rule we have here announced. However, we will refer to a few cases analogous in principle, from other jurisdictions.

The case of *Delaware, Lackawanna and Western R. R. Co. v. Converse,* 139 U. S. 469, 477, was for the recovery of damages on account of personal injuries sustained, and it is therein stated:

"Another error assigned is the refusal of the court to allow proof by the defendant of the fact that the manner in which the plaintiff crossed the railroad tracks, between six and seven o'clock in the evening, on his way from Jersey City to the County Farm, showed

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negligence upon his part. Plainly, this evidence was irrelevant. It did not, in any wise, illustrate the issue as to whether the defendant was guilty of negligence, or whether the plaintiff was guilty of contributory negligence two hours later in the evening, when the plaintiff, returning from the County Farm, attempted to cross the railroad tracks."

In *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239, 240, it is said:

"The only error that occurred in the trial in the court below was in the admission of the testimony that the driver had been seen on several previous occasions to stop the car suddenly. The plaintiff's complaint was that in consequence of a sudden stop he was thrown from the platform, and injured by being run over. The question for the jury, supposing he had satisfied them that he was in the exercise of due care, was as to the exercise of the like degree of care on the part of the defendant at the time of the accident. The fact that the same driver had at some other times been guilty of careless or unskillful management could have no legitimate bearing upon the question as to the care or skill exhibited at the time in controversy."—*Robinson v. F. & W. R. R. Co.*, 73 Mass. 92, 95; *C. R. I. & P. Ry. Co. v. Durand*, 65 Kan. 380; *Little Rock & M. R. Co. v. Harrell*, 58 Ark. 454; *Dalton v. C. R. I. & P. Ry. Co.*, 114 Iowa 257; *C. B. & Q. R. Co. v. Lee*, 60 Ill. 501, 504.

Plaintiff maintains that this evidence was admissible under his second cause of action, which he asserts "charged wantonness and recklessness in the particular negligence;" and contends, that as the second cause, by an instruction of the court, was withdrawn from the consideration of the jury, the evidence was likewise withdrawn, and no error intervened.

It is not at all certain that the complaint states two causes of action. However, were we to assume, that the alleged second cause of action, sufficiently charges

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wilfulness and wantonness in the sense of a wilful or intentional act, the evidence was, nevertheless, inadmissible. If such evidence be proper in any given case, it is, as we have heretofore stated, to establish a condition of a thing, or charge one with notice, either of defects, conditions or incompetency, none of which questions are involved in this case. It is quite true, that when two causes of action are separate and distinct, or the facts of one are not interwoven with the facts of the other, the withdrawal of the cause to which alone the evidence applies will necessarily withdraw the evidence in support thereof. But where evidence wholly inadmissible, is placed before a jury, and is as applicable to one cause as to the other, or is of such character and nature that the court is unable to say it had no influence upon the jurors in the determination of the issues, the simple withdrawal of the cause, under which the objectionable evidence is claimed to have been admitted, can not remove the evil effect thereof, and the judgment must be reversed.

The evidence in question comes clearly within the last stated rule. In each of the supposed causes of action it is alleged that the agents and servants in charge of defendant's car, were reckless, inexperienced and incompetent, and that defendant had knowledge thereof. Moreover, the objectionable evidence went before the jury without the court in any wise limiting its purpose or effect. When defendant interposed objections to the evidence, counsel for plaintiff simply remarked that it was offered under the second cause of action. The court made no ruling other than to admit the evidence. No intimation was given, that, in the opinion of the court, the evidence was applicable to the alleged second cause of action only. Whether an instruction, specifically withdrawing the evidence from the jury, would have removed its evil effect, need not be here considered as there was no such instruction given. Where il-

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legal evidence is introduced and placed before a jury, over the objection and exception of one of the parties, the error is presumed prejudicial to the party excepting thereto, unless it affirmatively appears that it was not. In a case involving this principle, *D. S. P. & P. R. Co. v. Wilson,* 12 Colo. 20, 26, we said: "It is impossible to say that the admission of this testimony was error without prejudice; it may have been the very thing that induced the jury to find negligence on the part of defendant." Presumably every error is prejudicial to the party against whom it is committed, and the presumption can not be overcome until it appears, beyond doubt, that the error did not, and could not have prejudiced the party's rights. *Rio Grande Sn. R. R. Co. v. Campbell, supra,* is peculiarly applicable to the facts of this case. There one of the questions was, whether the particular cars between which plaintiff was injured in attempting to couple them, were engaged in moving interstate traffic. Plaintiff, over objection, was permitted to introduce testimony to prove that defendant frequently received from, and delivered to connecting lines, passengers and freight which had come from, or were destined to points without the state. In the progress of the case, it was determined that the act of Congress requiring common carriers engaged in interstate commerce, to equip the cars with automatic couplers, was not involved. Thereupon the trial court undertook to cure the error in the admission of the evidence, by instructing the jury to the effect that the Congressional Act was not involved, and that no liability of the defendant to the plaintiff could be predicated upon the violation thereof by the former. In holding that the instruction did not cure the error it is said:

"The tendency of the testimony under consideration would be to influence the jury in favor of the plaintiff, and must, therefore, be regarded as having this effect unless it clearly appears that the defendant was not

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prejudiced there. * * * * The rights of litigants can only be preserved by adhering to this rule. Cases should be tried before a jury on competent testimony, and when a party insists in getting before them testimony which is incompetent, he does so at his peril, and thereby has imposed upon him, when the case is reviewed, the burden of showing that the jury was not influenced in his favor thereby."

And after stating that the testimony bearing on the subject of the negligence of the defendant was close, it is further said:

"When the jury were advised that the defendant had engaged in interstate commerce and that an act of congress required railroads so engaged to equip their cars with automatic couplers, it is impossible to tell to what extent it may have influenced the jury in rendering its verdict, or to what extent, when it happened that the cars between which plaintiff was injured were not equipped with automatic couplers, it may have created a prejudice in the minds of the jury which prevented them from giving that careful consideration to the competent testimony bearing on the subject of the defendant's negligence which they should."

So in the case at bar. The material issue involved was, whether the servants of defendant were negligent in starting the car before the plaintiff had gotten aboard thereof, and evidence tending to prove that, at other times and places, such servants were negligent in regard to starting the same or other cars, was not admissible, and, moreover, was highly prejudicial to defendant's rights.

The plaintiff was permitted to testify, that the sartorius muscle was sore from the effects of the injury, and by reason thereof he was unable to bear any weight upon his leg. A physician was also permitted to testify that plaintiff developed pleurisy as a result of the injuries occasioned by the accident. It is conten-

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ded that the testimony in each instance constitutes reversible error. It is argued that the evidence was not admissible under the pleadings and bill of particulars. The complaint alleged that, "the neck of the right femur of the plaintiff was broken and the flesh, muscles and tissues surrounding the same were very greatly injured, lacerated and torn, and the body of this plaintiff was severely bruised, beaten and wounded." The bill of particulars described in technical language certain bones broken and wrenched, muscles and tissues lacerated and torn, but did not designate the sartorius muscle. The particular injuries resulting from the principal one were specified in the complaint or bill of particulars, but do not include pleurisy, unless covered by the general allegation of pain. A general allegation of injury or sickness as an element of injury, resulting from an accident, is sufficient to let in proof of the character here under consideration. *Montgomery v. Lansing*, 103 Mich. 46. Nevertheless, when a plaintiff alleges what his injuries are, and the particulars thereof, he can not be permitted to offer proof of injuries in no wise specified. *Arnold v. City of Maryville*, 110 Mo. App. 254, 260. Without applying the rules stated and testing the complaint thereby, we suggest that it would be safer. upon another trial, for plaintiff to amend his pleadings and broaden his bill of particulars to meet the objections urged. We do not wish to be understood, however, as holding that, under the allegations of the complaint, the defendant was entitled to a bill of particulars, or that, without amendment, the particular evidence could properly have been received.

Plaintiff was permitted to testify, that since the injury he had been unable to attend to the business (not naming it) in which he had been engaged prior thereto, or to attend to any business. It is argued that this evidence was improper, under the pleadings, as the damage occasioned by the loss of time, or interference

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with the business of plaintiff, was necessarily special. There was no error in receiving the evidence. It was proper for the purpose of showing the extent, or permanent nature, of the injury sustained.—*C. S. & I. Ry. Co. v. Nichols,* 41 Colo. 272; *City of Denver v. Human,* 9 Colo. App. 144.

2. Defendant tendered an instruction, to the effect that the plaintiff had failed to prove the allegations in Subdivisions "D" and "E" of his complaint, and requested the modification, to the same, effect, of instruction No. 1 given by the court. The tendered instruction, and the modification requested, were refused and the action of the court thereon is assigned as error. There was no evidence to support the allegations in question. If defendant had manned its car with reckless, inexperienced and inattentive servants, that alone would not have given plaintiff a cause of action; nor would the fact—if it be a fact—that the car was in charge of careful, prudent and experienced servants relieve the defendant from liability for injuries sustained through its negligence alone. The matters of experience or inexperience, of recklessness or prudence are in no wise involved. The case as made by the evidence, if not by the pleadings, was simply one of negligence or non-negligence, and should have been so limited. *D. & R. G. R. R. Co. v. Scott,* 34 Colo. 99, 106. Therefore, the instruction requested should have been given and the modification made, unless the effect thereof was covered by other instructions. We are inclined to think this was done. Instruction No. 7 expressly told the jury: "that the only allegation of negligence which is supported by the evidence and which is to be determined as a fact by you, is whether or not the car was stopped, and started while the plaintiff was attempting to board it."

The next alleged error we consider necessary to notice, is the refusal of the court to give instruction

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No. 5 requested, to the effect, that in considering plaintiff's evidence the jury should bear in mind that he was the plaintiff and interested in the result of the action. Though it was different at common law, under the statute, a plaintiff occupies exactly the same position as any other witness in a given case as to the weight to be given his evidence. The jury, in determining the weight of the testimony of each and all, have the right, and it is their duty, to take into consideration the interest which any witness, whether a party to the record or not, has in the subject matter involved in the litigation, and it is the duty of the court to so instruct.—*Salazar v. Taylor,* 18 Colo. 538; *Stewart v. Kindel,* 15 Colo. 539, 543.

This, however, was done in the case at bar. The jury were told that they must take into consideration the interest of the witnesses in weighing and extending credibility to their testimony. This applied to all witnesses, including the parties to the suit. The practice of singling out witnesses in an instruction, where the credibility of others testifying in the case may also be affected by their interest, has frequently been criticised by the courts. In *Phenix Insurance Co. v. LaPointe,* 118 Ill. 384, 389, the requested instruction, "that the plaintiff, LaPointe, and the mortgagee, Hartman, are both interested in the event of the suit, and that while said interest does not render them incompetent as witnesses, it goes to their credibility as such," was refused, and error assigned thereon. In overruling the assignment, it is said: "The instruction under consideration, if given, would give undue prominence to facts alleged as operating to discredit appellee's witnesses, while it ignored corresponding causes alleged to affect the credibility of witnesses for appellant."

In *Pennsylvania Company v. Versten,* 140 Ill. 637, 642, in passing upon a similar request, it is said:

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"The thirteenth (instruction) asked by appellant, to the effect that the jury might take into consideration the plaintiff's interest in the result of the suit, was properly refused, because in directing the jury to apply the test of interest in weighing the testimony, it singled out the plaintiff, whereas the same test was applicable to other witnesses in the case. * * * Under the rules of evidence, in weighing the testimony of witnesses certain tests are properly applied, and if asked to do so in a proper instruction, it is the duty of the court to tell the jury what those tests are. By our statute, interest in the event of a suit, as a party or otherwise, does not disqualify a person as a witness, but such interest may be shown for the purpose of affecting his credibility. That test, when applied, must extend to all witnesses alike who are interested, either as parties, agents, or servants of parties, or otherwise."

Some authorities are cited which tend to support the contention of defendant. It appears, however, in each case the success of the plaintiff, upon the vital point in the case, depended solely on the plaintiff's own testimony, and, in most, it is not certain that any instruction covering the question of interest, as affecting the credibility of witnesses, had been given. Not so in the case at bar. Other witnesses testified substantially as did plaintiff, and instruction No. 13 particularly called the attention of the jury to the question of interest as affecting the credibility of witnesses and the weight to be given their testimony. The instruction given is the general one which has been uniformly used and approved in this state, and, under the circumstances of this case, was sufficient.

By instruction No. 3 the jury were advised that if they believed from a preponderance of the evidence, that certain facts and things, (enumerating them, substantially), as set forth in the general allega-

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tions of the complaint, occurred, "and that these conditions were brought about and resulted solely from the negligence of the servants of the company, as charged in the complaint, then and in that event, the plaintiff is entitled to recover a verdict at your hands for damages for the injuries so sustained."

Two objections are urged against the instruction. It is claimed, that it does not confine the jury to a consideration of the specific acts of negligence charged and sustained by the evidence, but permits them to consider any and all alleged in the complaint. We think counsel has misconceived the scope of the instruction. It covers only, and thereby confines the jury to a consideration of, the facts and circumstances relating to plaintiff's attempt to board the car and the manner of its starting, and the injury sustained. It is further claimed, that the instruction took away from the jury the determination of the question, whether the act of the defendant in starting the car under the circumstances shown by the evidence, was a negligent act. We are not impressed with defendant's contention, nor are the authorities cited in support thereof in point. Whether or not defendant was guilty of negligence was necessarily a question for the jury, under all the facts of the case. But they were expressly told that before they could find for plaintiff, they must believe from a preponderance of the evidence "that these conditions (enumerated) were brought about, and resulted solely from the negligence of the servants of the company." Not so in the cases cited. In each of those the jurors were advised that if certain things occurred, they should return a verdict for plaintiff, without being required to find, as a condition precedent, that such things resulted solely from the negligence of the defendant.

Defendant contends, that instruction No. 4, as to the measure of damages, is erroneous. It is claimed,

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that the instruction eliminates the fact that the jury must determine, from a preponderance of the evidence, the amount that should be awarded in compensation for the injury, pain and suffering endured by plaintiff, but left such matter solely to their "enlightened judgment"; and further, that it erroneously characterizes money as an inadequate compensation for such injuries. The jury were told that "the measure of damages in a case of this kind, cannot be accurately measured in money, but the money is the only measurement known to the law in such case." They were then, in effect, told that the amount to be awarded, if they found for the plaintiff, was "left to the enlightened judgment of the jury"; and, that in measuring such damages, they were to consider the age of the plaintiff, his expectancy of life, his physical pain and suffering, the mental anxiety, anguish and distress he had endured, the probability of its continuance, the nature and extent of the injury, as they severally appeared in evidence, and from all those facts and circumstances determine what would amount to a fair compensation to the plaintiff on account of the injuries sustained. The instruction might have been clearer, yet we think it is substantially the same as that approved in *D. C. T. Co. v. Martin,* 44 Colo. 324.

There are other alleged errors argued, which we deem unnecessary to consider. The points discussed and determined herein are the only ones we deem of importance, except one pertaining to alleged improper remarks of counsel in his closing argument to the jury, which will unlikely arise again.

The briefs filed cover approximately 600 pages, cite nearly 400 authorities from foreign jurisdictions, and 56 from this state, or a total of more than 450. Upon this feature of the case we refrain from comment. A statement of the facts alone is sufficient.

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The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GABBERT concur.

[No. 6013.]

KIRBY ET AL. v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

1. JUDGE'S CHAMBER—*Must Be Located Within the District*—Under Sec. 471 Rev. Code (Sec. 436 Mills Code), a judge may make orders, and exercise judicial authority, only when sitting in court, or at his chambers; and under Rev. Code Secs. 443, 444, (Mills Code Secs. 408, 409) the chambers of a district judge must be located within his district. An attempted exercise by a district judge, of judicial authority, in a matter pending in, or pertaining to, the courts of his district, at a time when he is outside of his district, is without warrant of law and void—(85-88).

To present to a judge an affidavit of the facts constituting a contempt, as required by the code (Rev. Code Sec. 356, Mills Code Sec. 322) is to lay it before him for judicial consideration and action. This is the first step in the proceeding against the contemnor, and the presentation must be made at a place where judicial consideration and action may lawfully ensue. Until this is done the proceeding cannot be said to have commenced, or the charges to have been made; therefore a warrant for an attachment for an alleged contempt, issued by a district judge while he is absent from his district, though within the state, upon affidavits presented to him while so without his district, is a nullity, and should be quashed upon motion—(90).

2. STATUTES—*Construed*—A statute (Rev. Code Sec. 471, Mills Code Sec. 436) provides that "the judges of courts of record shall at all reasonable times, when not engaged in holding courts, transact such business at their chambers as may be done out of court. * * * They may hear and dispose of all applications for orders and writs which are usually granted on *ex parte* application, and may, in their discretion, also hear

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applications to discharge such orders and writs." *Held*, a positive direction that all judicial action had out of court shall be had at the chambers of the judge. *Held further*, that the chambers of a judge of the district court must be located within his district—(85-88).

The provision of the code that to initiate proceedings to punish a contempt not committed in the presence of the court an affidavit of the courts constituting the alleged contempt "shall be presented to the court or judge (Rev. Code Sec. 356, Mills Code Sec. 322) imports that the affidavit is to be laid before the judge for judicial consideration and action; and under the provisions of Rev. Code Secs. 471, (Mills Code Sec. 436) such presentation must be to the court, sitting as a court, or to the judge, at his chambers, where alone, judicial consideration and action can be had—(84, 85).

3. MOTION — *Construction* — *Waiver* — A motion to quash an attachment issued by a district judge, not sitting in court nor within his district, for an alleged violation of an injunction, set forth as grounds thereof (1) That the Court had no jurisdiction to allow the injunction. (2) That plaintiff in the injunction suit had no capacity to maintain an action in Colorado. (3) That no affidavit had been presented to the judge, within the limits of the judicial district setting forth any facts as to the alleged contempt.

The assignment of the first two grounds of the motion was held no waiver of the last—(90).

Error to Pueblo District Court—Hon. N. WALTER DIXON, Judge.

Mr. S. HARRISON WHITE, for plaintiff in error.

Mr. CHARLES W. WATERMAN, for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

The plaintiff in error was adjudged guilty of contempt for violating an injunction theretofore issued out of the district court of Pueblo county, in the tenth judicial district. The affidavits, upon which it is claimed the contempt proceeding was based, were pre-

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sented to the judge of the tenth judicial district at Denver, in the second judicial district. The judge acted upon these affidavits and issued a warrant of attachment at Denver, returnable at Pueblo, and the affidavits were then transmitted to the district court clerk of Pueblo county and filed. No affidavit was ever presented to the district court of Pueblo county, or the judge thereof, within the territorial limits of the tenth judicial district, prior to the making of a motion to quash the warrant of attachment, by the plaintiff in error. This motion to quash was based upon three grounds; first, that the court had no jurisdiction to issue the original injunction alleged to have been violated by the defendant; second, that the plaintiff in the original action in which the injunction was issued had no capacity or authority to maintain an action in the state of Colorado; third, because no affidavit had been presented to the district court of Pueblo county, or to either of the judges thereof, within the limits of the tenth judicial district, setting forth any facts as to the alleged violation of the injunction. This motion was overruled by the court, to which ruling exceptions were duly saved. An answer was then filed by the plaintiff in error and the matter heard by the court.

Section 356 Rev. Code, sec. 322 Mills' Ann. Code, provides for the initiation of a proceeding in contempt as follows:

"When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators."

In *Thomas v. People,* 14 Colo. 254, this court held that it was necessary to present an affidavit substantially as provided in this section before the court has jurisdiction to act. Obviously, to present an affidavit,

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as contemplated by this section, is to lay it before the court or judge for judicial consideration and action. This is the first step provided for the commencement of the proceeding, and, of course, until it is done the proceedings can not be said to have commenced or the charge made. No affidavit was ever presented to the court for action thereon in this matter, although two were filed, until and except as presented in connection with the motion to quash. If it also appears that, at that time, no affidavit had been presented to the judge, as the code provides, then the court was without jurisdiction to proceed, and of necessity the motion to quash ought to have been sustained. As no affidavit had been presented to the court, it only remains to be determined whether any affidavit had been presented to the judge, within the contemplation of the section of the code quoted above. A reading of that section conveys to the mind the meaning that the affidavit shall be presented to the court or judge at chambers. If this meaning is not obvious from a reading of the section, it becomes clear when it is ascertained when and where a judge may act out of court. A judge can attempt to do judicial business only in court or out of court. He can only do such judicial business out of court as the statute expressly directs.—*Gruner v. Moore,* 6 Colo. 526.

Section 471, Rev. Code, sec. 436 Mills' Ann. Code, provides that, "The judges of courts of record shall, at all reasonable times, when not engaged in holding courts, transact such business at their chambers as may be done out of court. At chambers they may hear and dispose of all applications for orders and writs which are usually granted in the first instance upon *ex parte* application, and may, in their discretion, also hear applications to discharge such orders and writs." This is a positive direction that all business, which may be done out of court, shall be done at the chambers

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of the judge. A judge, therefore, is a judge in the sense that he may do judicial business only in court or at his chambers. What are the chambers of a judge of the tenth judicial district? Rapalje, in his Law Dictionary, defines the word "chambers" as follows:

"Attached to the various courts of record are rooms called chambers, in which the judges sit to transact business which does not require to be done in court, or can be more conveniently disposed of in chambers."

Vol. 3, Am. & Eng. Ency. of Law, p. 68, says:

"Office or private room of a judge where parties are heard and orders made and other business transacted in matters which do not require to be done in open court."

Bouvier says:

"Chambers. In Practice. The private room of the judge. Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be *in chambers*. The act may be an official one, and hearing may be in the court room; but if the court is not in session, it is still said to be done *in chambers*."

In 4 Ency. of Pl. & Pr. 337, it is said:

"The term 'chambers,' in its usual significance, means the private rooms or office of a judge, or other place where motions are heard, orders made, or other business is transacted by a judge out of court in term time or during vacation, in matters which do not require a hearing by a judge or judges sitting as a court."

In *Commonwealth v. McLaughlin*, 122 Mass. 449, an indictment for perjury averred that a motion for a new trial was heard by a justice of the superior court "at his chambers," and this was held satisfied

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by proof that the hearing took place in an apartment appropriated to the use of that court for the transaction of business not requiring the presence of a jury, the court said:

"By the 48th rule of the superior court, motions for a new trial may be heard by a judge 'at chambers.' We must suppose that the motion in this case was so heard, and not at the private lodgings of the judge."

These authorities, as well as sec. 471 of the Code, which uses the expression "at their chambers," certainly contemplate a location within some limits less than the entire state, for the chambers of a judge of the tenth judicial district. What was done in this case was done outside of the territorial limits of the tenth judicial district, so that it is not necessary (and under our statutes it might be improper) to restrict such location within limits as narrow as these authorities seem to contemplate. That district has two judges and comprises three counties, in each of which is a court. If a court of a judge of the tenth judicial district is spoken of as "his court," it would certainly mean one of the courts in that district, and not some court outside of that district. Of course a judge, under the laws of this state, may hold court in some other district for another judge; but when he is holding court in another district, he is a part of the court of that district. The judges of the tenth judicial district hold their courts in that district. Their judgments, processes and writs may operate upon persons and things throughout the state, but this does not give them the right to perform judicial acts in connection with their courts in any part of the state. They are elected for that district by the people of that district only. When elected they must be electors and therefore residents of that district. The court-houses in which they hold their courts, the records thereof, the clerks and sheriffs connected therewith must all

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be in that district. In fact everything else connected with their courts must be in that district. Nothing exists upon which to base a reason for saying that the chambers of the judges of that district, at which they are enjoined by statute to do such judicial business pertaining to the courts of their district as may be done out of court, may be located anywhere in the state. The statute does not, in terms, empower them to do such business anywhere in the state, but only "at their chambers." Sec. 443 Rev. Code specifies a number of things which the judges may do in vacation "in chambers," and makes it the duty of district judges "each in his own district," to prescribe, by general rule, the time or times and place or places, at which motions and demurrers in actions pending in his district, may be heard in vacation. The very next section, 444, specifies what things the judges may do "in any part of the state," and these are but two, namely, to take and certify, first, "the proof and acknowledgment of a conveyance of real property, or any other instrument required to be proved or acknowledged," second, "an affidavit to be used in any court of justice in this state." It was plainly the intention of the legislature to distinguish in locality between the expression "at chambers" and the expression "in any part of the state."

Dunn v. Travis, 26 Pac. 247, was an action involving the act of a Kansas district judge, while in Illinois, in extending the time for the service and settlement of a case made. While this case is not strictly in point here, yet the remarks of the court are applicable to show how an act of the judge, outside of his district, was regarded. The court said:

"The order extending the time is therefore a nullity, as it will not be seriously contended that he could make judicial orders while absent from his district."

Bedwell v. Ross, 73 Pac. 267, was an action com-

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menced in the district court of Woods county in the sixth judicial district of Oklahoma Territory. The judge who had been assigned to the sixth judicial district, while in the fourth judicial district, granted a temporary injunction in the case. The court, after referring to the case of *Stanley v. United States*, 1 Okla. 336, said:

"This injunction order was issued by Judge Pancoast as a district judge. Now, taking the decision just referred to, and reading it in the light of such changes as have been made by subsequent acts of congress, it clearly shows the fact that the action of the district court in performing a judicial act outside of the limits of the judicial district to which he had been assigned by the supreme court was an unauthorized exercise of authority, and that the subsequent dissolving of such injunction on that ground was in strict accordance with the law of this territory as laid down by the supreme court."

In that case it appears that the organic act of the territory provided that the territory should be divided into judicial districts; that a district court should be held in each county, at such place and time as prescribed by law; that each judge of the supreme court assigned to any district should reside in that district; that the judicial district should be defined and that the times and places at each county seat, in each district where court should be held, should be fixed. These provisions are all similar in principle to the provisions in this state.

Enough has been said to clearly show that the chambers of a district judge, at which he must do such judicial business as may be done out of court, cannot be located without the territorial limits of his district, and that any judicial act pertaining to the courts of his district, done by him outside of his district, is without authority of law, and, therefore, void

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Outside of his district, he is not a judge of his district, in the sense that he can do judicial business pertaining thereto. From this, it must necessarily follow that the presentation of the affidavits in this case and the action of the judge thereon, outside of the limits of his district, were nullities, and were not a presentation thereof and action thereon by the judge of that district, as contemplated by law. This being so, no jurisdiction was ever acquired of these proceedings, and the motion to quash ought to have been sustained. It is contended by the defendant in error that, inasmuch as the plaintiff in error included in his motion matters consistent with jurisdiction over his person, he thereby waived the issuance of the attachment outside of the tenth judicial district. The error of the defendant in error, in its contention, is to assume that this question goes to jurisdiction over the person of the plaintiff in error. That is not the case. The question goes to the jurisdiction of the court over the particular subject matter of these proceedings. That was not waived nor conferred by consent.

In *Thomas v. The People, supra,* a similar motion was made. The first ground was in the nature of a general demurrer, which always constitutes a general appearance in a court. The second ground was that the information filed was not verified. As far as jurisdiction over the person was concerned, it was as much waived in that case as it is in this; but this court held that the court had not acquired jurisdiction of the case or the subject matter thereof, and that the motion to quash should be sustained. Any other holding in this case would be the granting of a roving commission to the district judges of this state to transact any and all business which may be done out of court in any part of the state. Such a condition would be entirely foreign to the plain intent of the laws of

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this state, and would undoubtedly give rise to numerous opportunities for criticism which might often be deserved. It is more important that the courts of this state act within the law and that justice be administered in due form and with becoming solemnity than that this plaintiff in error be punished for this particular alleged contempt.

The judgment of the district court is, therefore, reversed. *Reversed.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE BAILEY concur.

[No. 6358.]

THE McALLISTER LUMBER & SUPPLY COMPANY v. ELDORA RESORT & POWER COMPANY.

CONTRACT—*Certainty*—A contract for the sale and delivery of a particular commodity, not specifying any amount or quantity, will not sustain an action for a failure to deliver. It binds the parties no further than may accord with their convenience or pleasure.

Error to Boulder District Court—Hon. JAMES E. GARRIGUES, Judge.

Mr. RICHARD H. WHITELEY, for plaintiff in error.

Messrs. STUART & MURRAY, for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

This action was commenced by the lumber company to recover damages for an alleged failure to deliver timber, according to a written contract, wherein the defendant sold and agreed to deliver timber, and the plaintiff agreed to receive and pay for the

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same. The complaint sets out the written contract and alleges in substance that the defendant delivered timber for several months, and then ceased and refused to deliver any more, in consequence of which the plaintiff was damaged. To the complaint a demurrer was filed on the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that the complaint was uncertain as to the identity, amount and quantity of timber which it concerned. The demurrer was sustained, the plaintiff elected to stand by its complaint, and judgment was entered against it for costs. That judgment and the ruling of the court in sustaining the demurrer is now before this court for review on error. The main argument goes to the certainty of the contract, which was set out in full in the complaint, and upon which the action is based. A court should uphold a contract whenever it can fairly do so. Because of this, much consideration has been given to this complaint in an endeavor to spell out, with reasonable certainty, what timber the parties desired to buy and sell, or the amount or quantity thereof. It has been impossible to do this. All that can be said with any certainty is that the parties agreed to buy and sell timber. What timber, or the amount thereof, seems more than anything else to be such timber and to such an amount as the one party may desire to deliver and the other to receive. If this court were to attempt to settle this uncertainty, it would be making a contract for the parties. As this can not be done, the parties must be left with the contract which they made, and the judgment is, therefore, affirmed.

Judgment affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE WHITE concur.

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[No. 6561.]

OWEN V. OWENS.

1. CHATTEL MORTGAGE—*Possession Remaining With the Mortgagor After Default*—Mortgagee of chattels who permits them to remain in possession of the mortgagor for an unreasonable time after the maturity of the mortgage debt, loses his lien as against the intervening claim of a third person—(94).

And where of two mortgagees of the same chattels, from the same mortgagor, each permits the mortgagor to retain the goods for an unreasonable time after default made, he who first takes possession is preferred—(94).

That his mortgage is junior in time, and that at the time of accepting it he has actual notice of the prior mortgage is immaterial—(93, 94).

Under the statute (Laws 1899 c. 86, Rev. Stat. Sec. 518) thirty days and no more is allowed the mortgagee, after the mortgage debt matures, in which to assume possession of the chattels—(94).

Error to Chaffee District Court—Hon. MORTON S. BAILEY, Judge.

Mr. GILBERT A. WALKER, for plaintiff in error.

Mr. G. K. HARTENSTEIN, for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

This controversy is over the right to the possession of certain personal property, claimed by each of the respective parties hereto, as mortgagee thereof, from the same mortgagor.

The mortgage, under which plaintiff in error claims, was acknowledged June 29th and recorded July 1, 1903. It was given to secure the payment of a promissory note due December 5, 1903. The mortgage is set forth in the amended complaint, and is in the usual form, reserving to the mortgagor the right of possession of the chattels until default in payment of the note, upon which event the right of possession should vest in the mortgagee.

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Defendant's mortgage is subsequent in date and record to plaintiff's, and was taken with actual and constructive notice thereof. June 1, 1904, defendant, under and by virtue of this mortgage, took possession of the chattels from the mortgagor, in whose possession they had, until then, continuously remained. Plaintiff sought to recover possession of the chattels from defendant. These facts all appear from the amended complaint.

Defendant demurred, upon the grounds, that the amended complaint fails to state a cause of action, and, in certain particulars named, is ambiguous, unintelligible and uncertain.

The demurrer was sustained, and judgment entered against defendant, to reverse which he prosecutes this suit.

Where two successive mortgagees have both permitted the mortgaged property to remain in the possession of the mortgagor for an unreasonable length of time, after the maturity of the respective mortgages, neither one can, as against the claim of a third party, enforce his mortgage lien, but, as against each other, the one first acquiring possession of the property is entitled to priority.—§ 518, Rev. Stat.; *Cassell v. Deisher*, 39 Colo. 367.

Under the facts of this case, and the law as declared by the statute and case cited, thirty days was a reasonable time in which to take possession of the mortgaged chattels after the maturity of the indebtedness secured by the mortgage.

The amended complaint shows, that not only thirty days, but six months, had elapsed since the maturity of the indebtedness secured by the mortgage under which plaintiff claims, when defendant took possession of the chattels. What time had elapsed, after the maturity of the indebtedness secured by defend-

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ant's mortgage, is not disclosed, but is of no consequence. Defendant, by virtue of his mortgage, first acquired possession of the property, and, under the law, is entitled to priority. The question of notice is wholly immaterial.—*Cassell v. Deisher, supra; Stanley v. Citizens' C. & C. Co.*, 24 Colo. 103; *Brereton v. Bennett*, 15 Colo. 254.

The statute, and the cases cited, settle the controversy in favor of defendant in error. The judgment is, therefore, affirmed.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GABBERT concur.

[No. 6414.]

MERCHANTS' MUTUAL FIRE INSURANCE COMPANY v. HARRIS ET AL.

1. APPEAL—*Findings on Sufficient Evidence*, are conclusive on appeal—(102).

2. EQUITY—*Reformation of Writing—Insurance Policy*—Harris, managing an establishment known as "The EXPOSITION," applied for insurance upon the merchandise and fixtures therein, the property of one Arkush, as well as upon certain household goods therein, his individual property. Under the instructions of the insurer's agent he made a single application in the name of "The EXPOSITION, Ernest Harris, Mngr.," specifying the goods insured, the insurance on each, but not alluding to the separate ownership. This application being forwarded, by the agent, without explanation, the policy was issued to Harris, describing both his goods and those of Arkush. Harris being unfamiliar with business and business forms, accepted the policy with only a casual examination of it, and paid the premium. In framing the policy the company inserted the name of Harris as the insured, deliberately, and of set purpose, because under its by-laws, it was required that only individuals could be insured, who thereby became members. *Held*, that nevertheless, giving the policies this frame must be deemed a mutual mistake, repug-

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nant to the real intent of the parties, to-wit, the indemnification of both Harris and Arkush against loss upon their separate individual properties, and that equity might reform the policy so as to make is express the real intent—(103, 104).

3. INSURANCE—*Soliciting Agent Represents Insurer*—The agent of an insurance company preparing an application for insurance represents the insured, and the knowledge which he acquires in the premises is the knowledge of the company—(106).

4. ——*Title of Insured*—Where chattels owned in severalty by two parties, are, upon application by one of them, insured as the property of that one alone, and are at the time under mortgage, of which no mention is made in the application or policy, but the agent of the insurer has at the time explicit information of the separate ownership of the chattels, the policy is not avoided, even though it expressly provides that it shall be void, "if the interest of the insured be other than unconditional and sole ownership * * * or be or become encumbered by chattel mortgage"—(109).

5. ——*Application—Question not Answered*—Where one of the questions set down in the printed form of application for insurance is not answered, or is answered imperfectly, it is the duty of the insurer, if more specific information is desired, to apply for it before issuing the policy. The acceptance of such imperfect application, and issuing the policy, is a waiver of the imperfection—(112).

6. ——*Condition against Encumbrance*, applicable to the insured property as an entirety, is not broken by the encumbrance of a part only—(112).

7. ——*Conditions Known to Agent*, and by which the policy is made void from the beginning, are waived, when the state of facts leading to this result is known to the soliciting agent at the time of accepting the application—(113).

8. ESTOPPEL—*By Conduct*—One who in applying for insurance makes full and truthful disclosure of the state of the title of the property insured, and in framing the application acts under the directions of the soliciting agent of the insurer, and afterwards accepts the policy transmitted to him, and pays the premium thereon, is not estopped to demand a reformation of the policy, where in fact, it fails to conform to the application in respects which did not attract his attention, upon receiving it—(114).

Appeal from Denver District Court—Hon. HUBERT D. SHATTUCK, Judge.

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Mr. R. E. STEVENS, for appellant.

Mr. GEORGE ALLAN SMITH, for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court:

Plaintiffs sue for reformation of a certain contract of insurance, and for recovery of $2,000,000 for loss of, and damage to, property covered thereby, at the city of Boulder, Colorado. The policy was written in favor of the plaintiff, Ernest Harris, individually, on the 13th day of June, 1906, for one year, the premium being $24.40. The fire occurred July 26th next after the issuance of the policy. It is claimed that $1,200.00 of the insurance was on property belonging to Sol Arkush, one of the plaintiffs, and the balance, $800.00, on property of the other plaintiff, Harris. It was sought in the suit to reform the policy to make it speak the truth, touching ownership, according to the alleged facts. Plaintiffs had judgment for $2,000.00, the amount of the policy, and a decree for its reformation as prayed. The defendant brings the case here to review that judgment and decree.

A complete understanding of the facts disclosed at the trial, and generally of the issues involved, can best be had by setting forth at length the findings of the trial court. These findings evidence the utmost care in the disposition of the case, and show that the matter was adjudged only after full consideration of both law and fact questions. The statement of findings, as it appears in the record, follows:

"And the court having read the pleadings and heard all of the evidence presented and the arguments of counsel, and being now fully advised in the premises, doth find the issues in this cause for the plaintiffs, and doth further and specifically find the following facts:—

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That the defendant company was, on June 13th, 1906, and now is an insurance corporation, organized under the laws of the state of Colorado and carrying on the business of fire insurance in said state; that on June 13th, 1906, the plaintiff, Sol Arkush, was the owner of a certain stock of goods and store furniture and fixtures, described in the application and policy of insurance hereinafter mentioned and which were situated in the store building at No. 928 Pearl street in the city of Boulder, and continued to be the owner thereof until after the fire at said building on July 26th, 1906; that the plaintiff, Ernest Harris, was in charge thereof as the agent of Arkush, and that at said times the plaintiff Ernest Harris was the owner of certain household furniture and goods which he had in the back part of said store room, which he occupied also as a living room; that said place was known as "The Exposition," and the business therein conducted was in the name of "The Exposition."

The court doth further find that on June 13th, 1906, W. J. King was an agent of the defendant company employed and authorized by it to travel about the state of Colorado to solicit and procure for it applications for fire insurance, and was furnished by the defendant with certain printed blank applications for insurance in the defendant company; that it was part of his duty, after procuring the same to be signed by applicants for insurance, to forward such application to the defendant company filling the same out with such other information as he might be able to obtain himself about the proposed risk in addition to that which he obtained from the applicant; that on June 13th, 1906, said King visited The Exposition, and solicited the plaintiffs, through the plaintiff Harris, to take out fire insurance on the aforesaid property; that King filled in answers to only part of the questions printed on the face of the application, and

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procured the plaintiff Harris to sign the same in the name of "The Exposition by E. Harris, Mngr."; that King at the time was fully and truly informed by Harris as to the diversity of ownership of the property, and of a certain chattel mortgage to Selchow and Righter, hereinafter mentioned, and the condition thereof; that King stated to Harris that the application signed in the name of "The Exposition by E. Harris, Mngr." was the proper way to make application for a policy of fire insurance in the defendant company to cover the property of both plaintiffs on said premises, and that the application thus signed was in correct form and the defendant would issue a proper policy thereon which would insure both of the plaintiffs to the extent applied for in said application.

The court doth further find that King forwarded said application to the defendant company, who received and accepted the same and thereupon, and without consultation with plaintiffs, or notifying plaintiffs or either of them, that the application was in any way incorrect, issued to them its policy of fire insurance, covering the property described in the application, as follows, to wit:

Two hundred dollars ($200) on the store furniture and fixtures,

One thousand dollars ($1000) on the stock of merchandise, and

Eight hundred dollars ($800) on the household furniture and goods; that the defendant company, in writing the policy, ignored the application as to the name "The Exposition," and issued the policy in the name of Ernest Harris instead of "The Exposition"; that the policy was then mailed by defendant to the plaintiff Harris, who was unfamiliar with insurance law or the provisions of insurance policies, and who, upon receiving the policy, examined the same but cas-

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ually, and observing that the property and amounts of insurance applied for were all right, believed that the policy was correct and that it insured himself and Arkush in the amounts and on the property therein described, and thereupon sent the defendant company the premium for said policy, and that plaintiff retained said policy under such belief.

The court doth further find that on July 26th, 1906, a fire occurred at the store without fault on the part of the plaintiffs, and by reason thereof, the plaintiff Sol Arkush suffered a direct loss and damage to the store furniture and fixtures in excess of the sum of two hundred dollars ($200) and to the stock of merchandise in excess of the sum of one thousand dollars ($1000); and the plaintiff Ernest Harris suffered a direct loss and damage to the household furniture and goods in excess of the sum of eight hundred dollars ($800); that notice of the fire and loss was sent to the company, and in response thereto, and within a day or two, J. R. Gardner, manager of the defendant company, visited the burned premises, asked who owned the property and was informed that Sol Arkush owned the store furniture and fixtures and stock of merchandise, and that Ernest Harris owned the household furniture and goods: that he thereupon asked for the policy, which was produced, whereupon he refused to adjust the loss, stating as his reason that the policy was in the name of Harris; that on August 8th, 1906, the defendant company wrote to Harris denying all liability on said policy on the alleged ground that Sol Arkush was the owner of the property described in the policy, and enclosed a check payable to Ernest Harris for the amount of the premium theretofore paid, which the plaintiff Harris refused to accept, and which he later caused to be returned to the company.

The court doth further find that the Selchow and

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Righter mortgage covered but a part of the property insured, and that Harris informed the agent, King, of the existence of the mortgage at the time the application for insurance was signed, and the amount that was still unpaid and secured thereby; and that it was due to the act and advice of the agent, King, that the question as to incumbrances contained in the application, instead of being answered affirmatively, was left blank, as were a number of other questions which were contained in said application.

The court further finds that no misrepresentations were made, or concealments practiced, either in the application or otherwise, by the plaintiffs, or either of them, and that the conduct of the plaintiffs toward the defendant was fair and in good faith, and that no evidence was presented in the case to warrant the serious charge made in the pleadings of the defendant that the fire was the result of the malicious and willful act of the plaintiff, Ernest Harris; that there was nothing in the case to show that the fire occurred other than as the result of unknown accidental circumstances.

The court doth further find that the law and equities of this case are with the plaintiffs; that the defendant company, after having received the plaintiffs' application, issued its policy of insurance and received the premium therefor, ought not, after a loss has occurred, be permitted to escape liability on the plea that owing to its own mistake the policy was not issued in the proper names of the assured, especially when its agent who solicited the insurance was fully informed as to the facts at the time the application was signed, and advised that it be signed as it was, and when the company without cause disregarded the application and wrote the policy in the name of but one of the assured.

The claim that the Selchow and Righter mortgage

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avoided the policy does not appeal to the court. Under the circumstances of this case, it is a technical defense without a meritorious reason in its support, for the evidence is uncontroverted that it was satisfied long before the fire occurred; also the agent of the company was informed of its existence and the amount due thereon at the time of the application, which was less than one hundred dollars ($100), and no representation in reference thereto was made to the defendant company in the written application.

The court therefore holds that as the mortgage covered but a part of the property insured, and as no representations were made as to the mortgage in the written application, and that the defendant company through its agent King had full knowledge of the same, it is not now in a position to avoid its contract of insurance because thereof."

These findings are supported by abundant competent testimony, and, upon authority of previous decisions of this court almost without number, are conclusive here, so far as the facts of the case are concerned, and must be so accepted in determining the propriety of the judgment now under review. They compel an affirmance thereof, unless the defendant was entitled to a different and more favorable judgment, as matter of law, upon these findings, by which this court is bound.

The main questions of law fairly raised by the record are:

First. Could the contract of insurance be lawfully reformed to fit the facts as found;

Second. Do the facts that the ownership was not sole and unconditional, and that there was an outstanding chattel mortgage on a portion of the insured property, avoid the policy; and,

Third. Are the plaintiffs, because of the conduct of Harris in receiving and retaining, without objection, the policy as written, estopped to deny that it correctly

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shows the persons for whom the indemnity was sought, intended and in fact given.

We are unable to discover any good reason why the contract should not be reformed to give protection to those whom it was intended to protect. The court found, and the proofs show, that the company's agent King had explicit information that certain of the goods to be insured, under the application of "The Exposition," belonged to Harris and certain others to Arkush. Harris was advised by the agent that it was proper to insure them under the designation used, and that by so doing the actual owners, as their respective interests might appear, would be fully protected. Although the application was in the name of "The Exposition, by Ernest Harris, Manager," the insurance company, on its own motion, without inquiry or investigation, wrote the policy in favor of Ernest Harris, individually, and delivered it to him. We are of opinion that such action was, under the circumstances, in effect a writing of the policy in favor of "The Exposition," and that had the policy been actually so written, the real owners might have recovered upon it, according to their respective losses. Why should reformation of the contract to show the facts, so as to permit recovery upon it by the real owners, who paid for the policy and by whom indemnity was sought and for whom it was intended, be refused? It seems that, because the company is a mutual one, under its by-laws policies should run to individuals only, who alone, it is claimed, can become members, and apparently for this reason, and this reason alone, the policy was written in the name of Ernest Harris, individually, instead of "The Exposition," as applied for. There is no room to doubt that the company intended to write this policy so as to be effective, under the application, and to give indemnity as thereby sought. It is doubtless true, as testified by Gardner, the com-

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pany's manager, that the policy was intentionally written in favor of Ernest Harris, but notwithstanding this the legal effect to be given the policy is indicated by the application itself, and the knowledge imparted to Harris by the soliciting agent, which was the knowledge of the company. It ought not now to be permitted to say that indemnity was intended exclusively for Harris, it being clear that had the policy been written to "The Exposition" those owning the property insured might have recovered upon it. In other words, the policy must be given effect according to the plain intent of the parties, as disclosed by the application, and the terms of the policy itself, viewed in the light of the facts imparted to the agent respecting ownership. To hold otherwise, under the facts of this case, would be to put the company in the most unenviable position of having advance knowledge, that in case of loss the policy could be defeated upon technical grounds, and in event of no loss the premium might be retained, an attitude which the company certainly never intended to assume.

The record clearly establishes a mutual mistake as to the effect of the policy as written. It is obvious that the company intended that the policy should give protection to the actual owners, and it had no purpose to do otherwise, when it substituted Harris, as the insured, in the place of "The Exposition." It is also equally clear that Harris, in accepting this policy, believed that the real owners were protected, in conformity with the assurance of the company's soliciting agent.

We have before us, therefore, a contract which, through mistake, does not fully express the true purpose of the parties. It was definitely understood that the policy to be issued would protect the owners from loss in case of fire. The application was made in the name of "The Exposition," but with full notice to

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the company, through its agent King, as to the diversity of ownership. This is shown by direct testimony, which leaves no doubt as to the intention and understanding of the parties. In attempting to embody this understanding in the contract, by mistake on the part of the company, which now seeks to avoid the policy, the written agreement did not effect that which it was understood between the parties would be accomplished. That a court of equity should in such case furnish relief is, we think, well settled.

In the case of *Thompson v. Phenix Ins. Co.*, 136 U. S., page 287, it was said:

"If, by inadvertence, accident or mistake, the terms of the contract were not fully set forth in the policy, the plaintiff is entitled to have it reformed, so as to express the real agreement, without the necessity of resorting to extrinsic proof."

In *Snell v. Insurance Co.*, 98 U. S., page 85, it is said:

"It would be a serious defect in the jurisdiction of courts of equity if they did not have the power to grant relief against mutual mistakes or fraud in the execution of written instruments."

To the same point we cite: *Graves v. Insurance Co.*, 2 Cranch, 419; *Insurance Co. v. Wilkinson*, 13 Wallace, 222; and *Woodbury Savings Bank, etc., v. Insurance Co.*, 31 Conn. 517.

The case of *State Insurance Co. v. DuBois, et al.*, 7 Colo. App. 214, goes further in upholding and enforcing a policy, over similar objections, based on like reasons, now urged and relied upon; than it is necessary to go to sustain the judgment under review. The policy there was issued to Bradford H. DuBois, individually, upon property owned by himself and brother, Jacob DuBois. There the title was said, by answer in the application, to be solely and unconditionally in Bradford DuBois by warranty deed, when as matter

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of fact it was owned jointly by the two brothers, by will. In a suit upon that policy by the brothers jointly, recovery was upheld, without even a reformation of the contract, upon the theory that they had a right to show their respective interests in the property destroyed, and to recover accordingly, as the diversity of ownership and nature of title had been fully stated to the soliciting agent.

To the point that the soliciting agent, in preparing an application for insurance, is regarded as the agent of the insurer, and that his knowledge is the knowledge of the insurer, we cite: *Pacific Mutual Life Ins. Co. v. Van Fleet*, 47 Colo. 401; *State Insurance Co. v. Taylor*, 14 Colo. 499; *State Insurance Co. v. DuBois, et al., supra; American Insurance Co. v. Donlon*, 16 Colo. App. 416; *Strauss v. Phenix Insurance Co.*, 9 Colo. App. 386; *Insurance Co. v. Chamberlain*, 132 U. S. 304; *Insurance Co. v. Wilkinson, supra; McMaster v. New York Life Ins. Co.*, 183 U. S. 25; *Sternaman v. Life Insurance Co.*, 170 N. Y. 13; *Schollay v. Drug Co.*, 17 Colo. App. 126; *Higgins v. Armstrong*, 9 Colo. 38; *Hummel v. First Nat. Bank*, 2 Colo. App. 571; and *Messenger v. German American Ins. Co.*, 47 Colo. 448.

Story on Agency, 9th ed., section 140, upon this question, has this to say:

"Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal, having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injurious-

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ly to the rights and interests of such party."

To the same point Vance on Insurance, at page 304, says:

"A second incident of the relation of principal and agent is that any information material to the transaction either possessed by the agent at the time of the transaction, or acquired by him before its completion, is deemed to be the knowledge of the principal, at least as far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all.

It is here to be observed—and the importance of the principle is so great that it cannot be too strongly emphasized—that these incidents of agency are created by the law and not by the parties. The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance, not because he has consented to be so charged, nor because he has authorized his agent to so bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him. It therefore follows that this incident created by the law in response to the demands of public policy, irrespective of agreement, cannot be destroyed or altered by the agreement of the parties. The parties cannot by their contract contravene the policy of the law in this instance any more than the husband by contract can escape his duty to support the wife, or the carrier can by contract exempt himself from liability for his negligent failure to carry safely his passenger. Those cases which ignore this principle, and regard these legal incidents as powers conferred and subject to limitation, are much to be deplored. Insurers should undoubtedly be allowed to protect themselves, in any legal way possible, against the fraud of their unfaithful agents, but not at the expense of innocent third parties. And when a loss caused by a

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dishonest agent must fall upon his principal or a third party, both equally innocent, the courts should not, and do not, ordinarily, hesitate in putting the burden upon the person who selected and controlled the agent."

To a similar proposition, we quote from the syllabus to the opinion of this court in *State Insurance Co. v. Taylor, supra,* as follows:

"Contracts of insurance are to be considered and construed by the same rules of law and of interpretation as other contracts, in order to carry out the intention of both parties. Consequently the employment by an insurance company of an agent to solicit, receive and forward to the company applications for insurance, to receive and forward policies, and to collect the premiums, makes him the agent of the company for the performance of these duties."

We come now to a consideration of the second question, as to the effect of the answer as to title, and the existence of the chattel mortgage.

The policy contained this provision:

"The entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; * * * or if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

No agreement was indorsed on the policy waiving these conditions, and there was a chattel mortgage on the property when the insurance was applied for and the policy written. The answer to the question as to ownership was that it was sole and unconditional. The court specifically found that the mortgage in question covered only a portion of the insured property; that it was fully satisfied long before the fire occurred; that the agent of the company was truthfully informed of its existence and the amount

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due thereon; that the answer in the application referring thereto was left unanswered, upon the advice of the soliciting agent; that the diversity of ownership was explicitly set forth and made known to the company's soliciting agent; that the soliciting agent told Harris that the application in the name of "The Exposition, by E. Harris, Manager," was the proper way to make it to cover the interests of both plaintiffs; that the application, so signed, was in correct form; and that the defendant would issue a policy which would insure both plaintiffs to the extent of their respective interests in the property. Under these conditions was the policy avoided, as matter of law, because of the existence of the mortgage and the diversity of ownership? Both of these questions are determined, adversely to the contention of the defendant, in *Pacific Mutual Life Ins. Co. v. Van Fleet, supra.* In the opinion, by Chief Justice Campbell, where a multitude of authorities are collected and commented upon, many from our own state, the conclusion is reached that where incorrect answers are made as to title, with the knowledge of the soliciting agent, and also where questions in the application are not answered, or answered imperfectly, and the company without making further inquiry issues the policy, such conditions are waived. In that opinion it was said:

"In *Continental Insurance Company v. Chamberlain,* 132 U. S. 304—which, if consistent with the doctrine announced in the Fletcher case in 117 U. S., *supra,* would, as the later pronouncement, be controlling—the court, by Mr. Justice Harlan, said that the soliciting agent was the agent of the company, and if he filled out an application, which he was not bound to do, or made representations or gave advice as to the character of the answers to be given by the applicant, his acts were the acts of the insurer, and the latter could not void the policy for a breach of the

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alleged warranties or representations therein contained. It is true that the court based its decision, in part at least, upon a statute of the state of Iowa in the light of which the contract of insurance was construed, declaring a soliciting agent to be the agent of an insurer in making out and transmitting applications. Nevertheless, the reasoning of the court upon general principles, as we believe, would make such an agent the representative of the insurer to the extent that his acts, in filling in the blanks, would be binding on his company.—*Insurance Company v. Wilkinson*, 13 Wall. 222, 235, 236. * * *

The facts of the present case being so nearly like those in the *Chamberlain* and the *Wilkinson cases*, *supra*, and the doctrine which we have applied here being in harmony with our own previous decisions, we do not hesitate to say, as applicable to the facts of the case at bar, that, since the assured correctly answered question 18, and the soliciting agent had knowledge that the applicant had received compensation for an injury, but did not put down the answer as given, but wrote a different one, even though the assured signed the application and is presumed to have read it, the wrong, if any committed, was that of the authorized agent of the insurer, and so the wrong of the insurer itself, and the latter cannot be heard to insist upon its right to declare void the policy on the ground of the alleged breach of warranty.

From another point of view, also, this alleged improper answer cannot be allowed to defeat the policy. In what we have already said we have assumed, with defendant, that this answer is equivalent to a statement by the assured that he had never received compensation from an insurance company for an injury. The alleged false answer on its face is imperfect and incomplete. It suggests that compensation might have been received. The defendant received

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the application with this incomplete and imperfect answer in it, took the applicant's premium money and issued the policy. Had it been dissatisfied with this answer, it should have withheld the policy until a more perfect and complete one had been given. Such being the case, it seems to be the general rule that the insurer cannot avoid the policy on the ground of any inaccuracy or incompleteness of such an answer.—2 Bacon Benefit Societies and Life Insurance, 427; 1 *Bacon* § 204, *et seq.; Manhattan Ins. Co. v. Willis & Bro. et al.*, 60 Fed. Rep. 236; *Phenix Life Ins. Co. v. Raddin*, 120 U. S. 183, where Mr. Justice Gray, in an elaborate opinion collects the authorities and comments upon them, and sums up by saying '* * * where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial.'—*Triple Link Association v. Froebe*, 90 Ill. App. 299."

In *State Insurance Co. v. DuBois, et al., supra*, opinion by Judge Reed, one of the paragraphs of the syllabus is as follows:

"A statement in an application for insurance * * * that the title was in the applicant and by warranty deed, when in truth it was in him and another by will, is not available as a defense to an action on the policy where it appears that the applicant disclosed all the facts to the soliciting agent of the company, by whom the misstatement was written."

In *National M. F. Ins. Co. v. Duncan*, 44 Colo. 472, at page 486, the court, in speaking of a false statement in an application for insurance concerning title, said that, since it appeared that the agent of the company had full knowledge thereof, and the company having issued the contract with such knowledge,

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a condition therein avoiding the policy, if the title to the property insured was not as represented, was waived. These additional authorities support this view: *German Ins. Co. v. Hayden,* 21 Colo. 127; *Furniture Mfg. Co. v. American Credit Indemnity Co.,* 124 Fed. 25; and *McElroy v. British America Assurance Co.,* 94 Fed. 990.

There was no answer to the question in the application, "Is the personal property to be insured encumbered?" What was said in *Pacific Mutual Life Ins. Co. v. Van Fleet, supra,* to the effect that where a question is not answered, or answered imperfectly, in the application, it becomes the duty of the company, if it desires more specific information, to ask for it before issuing the policy, else the condition is waived, is applicable to the objection now urged to this point under the facts as they are shown to be. It seems to be settled, upon principle and authority, that where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurer issues a policy without further inquiry, it waives the want of, or imperfection in, the answer and makes such omission or imperfection immaterial.—*Conn. Mutual Life Ins. Co. v. Luchs,* 108 U. S. 498; *Hall v. Insurance Co.,* 6 Gray 185; *Life Insurance Co. v. Mahone,* 56 Miss. 180; *Carson v. Jersey City Ins. Co.,* 43 N. J. L. 300; and *Jersey City Ins. Co. v. Carson,* 44 N. J. L. 210.

Besides, only a portion of the subject of insurance was mortgaged, as found by the court specifically, and the inhibition went against the encumbrance of the property in its entirety, hence the condition was not in fact broken. *Phenix Ins. Co. v. Lorenz,* 7 Ind. App. 266.

In *North British & Mercantile Ins. Co. v. Freeman,* 33 S. W. 1091, the Texas court of civil appeals, speaking to this precise point, said:

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"The subject of insurance in this case was the various articles of furniture, described collectively, the piano being one article of many covered by the policy. In order for a mortgage that existed at the time, or was afterwards given, to avoid the policy, under the clause above mentioned, it must have been upon the subject insured; that is, the entire property. The mortgages having reference to a part of the property, they did not defeat the policy."

Moreover, it is well settled, both in this and other states, that conditions in a policy are waived which make the policy void as soon as delivered, when the existence of the facts which lead to such result are known to the soliciting agent at the time the application was made, his knowledge being that of the company.—*Pomeroy v. Rocky Mountain Ins. & Sav. Inst.*, 9 Colo. 295; *Strauss v. Phenix Ins. Co., supra; American Ins. Co. v. Donlon, supra; Farmers & Merchants Ins. Co. v. Nixon,* 2 Colo. App. 265; *Home Insurance Co. v. Mendenhall,* 184 Ill. 458; *Mesterman v. Insurance Co.,* 5 Wash. 524; *Haire v. Insurance Co.,* 93 Mich. 481; *Philadelphia Tool Co. v. Assurance Co.,* 132 Pa. 236; *Menk v. Home Insurance Co.,* 76 Cal. 51; *Follette v. Accident Ass'n.,* 110 N. C. 377; and Vance on Insurance, page 362.

Was the conduct of Harris, in receiving and retaining the policy, such as to estop the plaintiffs from now claiming that the policy was in fact written to indemnify them both, rather than Harris alone? We think not. Harris had a right to believe that the policy would be issued to "The Exposition," and that when so issued would cover the insurable interests in the property of both himself and Arkush. He also had a right to rely upon the good faith of the company in issuing the policy to correspond with the application. All the more so since his attention was not called to the fact that the company had on its own

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motion and voluntarily issued the policy to Harris, personally, and not in conformity with the application, a change which his testimony shows, and the court finds, he did not observe on receipt of the policy. It would be wholly inequitable in upholding the company in making such change, if by so doing it is able to avoid the policy in case of loss, although paid in full for the issuance of a valid and binding obligation. If the company can by its own act so place itself it would thus be enabled to work a fraud upon the insured. It would know that it could defeat the policy at any time at will, should occasion arise, and if no such occasion transpired, then it could retain to its own use the premium, for which it had in fact given no value. When the consideration was paid for the policy it became a valid and binding contract of insurance, and it would shock all moral sense to allow the company to now say that, although it took the insured's money, the contract issued in return therefor was and is void, and that it is not bound or obligated thereby in any way. Furthermore, under the facts of this case, the essential elements of estoppel are not present. It must be held, since the company made no objection to the application by "The Exposition," that it was its intention and purpose, that being the thing for which it was paid, to insure those who had an insurable interest in the property, and could have recovered on the policy, had it been issued to "The Exposition." So that it cannot be said that to reform the policy, so as to afford protection to the real owners of the property and allow recovery thereon accordingly, will place the company in a worse position than it intended to take, and which in law it did take, when it wrote the policy in its original form. In this situation the company clearly may not, upon the ground which is now urged, invoke the doctrine of estoppel against the plaintiffs.—*McElroy v. British*

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America Assurance Co., supra; McMaster v. New York Life Ins. Co., supra; Taylor et al. v. Glens Falls Ins. Co., 44 Fla. 273; *Fitchner et al. v. Fidelity Mut. Fire Ass'n.*, 68 N. W. 710; *Burson v. Fire Ass'n. of Philadelphia*, 136 Pa. State, 267; *Dryer v. Security Fire Ins. Co.*, 82 N. W. 494; *Kister v. Insurance Co.*, 128 Pa. State 553; and *Zimmer v. Accident Ins. Co.*, 207 Pa. State 472.

We are of opinion that the findings of the trial court are amply supported and fully warranted by the evidence; that there has been no misapplication of the law to the facts; and that the judgment and decree is in all respects correct and should be affirmed, and it is accordingly so ordered.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE WHITE concur.

[No. 6417.]

EMPIRE RANCH AND CATTLE COMPANY v. COLDREN.

1. QUIETING TITLE—*Tender of Taxes not Required*—Paramount owner of land may have a bill to quiet title as against one claiming under a tax title, without tender of the taxes and statutory penalties—(119).

2. TAX DEED—*Sale to County*—A tax sale is commenced on the 19th of the month. Certain lands are offered on that and the succeeding day, and on the latter day are struck off to the county. The sale continues until and upon the 26th of the month. The sale and the deed thereunder are void—(120).

3. TAX SALE CERTIFICATE—*Assignment by County Clerk*—The County Clerk has no authority to assign a tax sale certificate after three years from its date (Mills Stat. Sec. 3888), and a deed issued upon such assignment is void—(121).

4. SUMMONS—*Service by Publication*—To confer jurisdiction of the person by constructive service of process the statute must be strictly complied with. Where the record shows such service

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by publication only, upon an affidavit containing no positive averment of defendant's non-residence, no averment at all of defendant's departure from the state or his concealment to avoid process, nor of his post office address, the judgment is a nullity and may be assailed even collaterally, by any one with whose rights it conflicts—(121, 122).

The recitation in the judgment record that jurisdiction of the defendant has been obtained is not conclusive where a view of the entire record discloses the contrary—(122).

Where the record is entirely silent upon the question it will be presumed in support of the judgment that the court proceeded regularly, and that what ought to have been done was done; but where an affidavit which attempts to show constructive service of proof is found, it will not be presumed that some other and different showing was made—(123).

The provision of the Code (Mills Code Sec. 44, Rev. Code Sec. 50) that "from the time of the filing of the complaint * * * the code shall be deemed to have acquired jurisdiction," has not the effect to confer jurisdiction of the person by the mere filing of the complaint; to give it this construction would render it obnoxious to both the federal and state constitution and permit the taking of property without process, notice and day in court. The provision merely confers jurisdiction of the subject matter, not of the person—(122, 123).

5. EVIDENCE—*Presumptions*—Nothing appearing to the contrary it will be presumed that every officer performs his duty. It being the duty of the treasurer to execute a certificate of purchase to each purchaser, at the conclusion of the tax sale, it will be presumed, the date of a certificate not appearing, that it was executed at the conclusion of the sale mentioned therein—(120).

Appeal from Washington County Court—Hon. C. W. BALLARD, Judge.

Mr. R. H. GILMORE and Mr. J. C. GUNTER, for appellant.

Mr. ISAAC PELTON and Mr. E. T. WELLS, for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court.

This is a suit to remove cloud from title, wherein

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appellee was plaintiff and appellant was defendant. The complaint alleges that the plaintiff is the owner in fee of the land in dispute and entitled to possession; that defendant wrongfully claims to be the owner, under a treasurer's deed executed on February 20, 1901, and filed for record in the office of the county clerk of Washington county on the following day; that the deed was void because the land was stricken off to the county on the first day of the sale, although the sale continued long thereafter; and also because the certificate of purchase thereof was assigned to the defendant by the county clerk, on the 23rd day of January, 1901, more than four years after its issuance and delivery. The complaint also sets forth that on the 2nd day of July, 1902, the defendant falsely and fraudulently procured the entry of a judgment in the county court of that county, decreeing it to be the owner and in possession of the land, and adjudging the plaintiff to have no title, estate or claim thereto; that service of summons in that action was attempted to be secured by publication; that plaintiff was not informed of the pendency thereof until several years after the rendition of the decree, nor until within sixty days before the filing of this suit; that plaintiff had a meritorious defense to the action; that he was then and still is the owner in fee of the land; that defendant had no title to, or interest in, the land, save and except as herein set forth; that the affidavit, upon which the order permitting service of summons by publication issued, contained no statement that the defendant resided out of the state, or that the postoffice address of the defendant was unknown, or any statement relating to his postoffice address; that said affidavit was wholly insufficient, under the statute, upon which to base an order for publication; and that the pretended judgment and decree, assuming to quiet title in the defendant to the land, was void and

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of no force or effect.

The first defense put in issue plaintiff's claim of ownership to the land and right of exclusive or any possession thereof; admits that it claims title to the premises by virtue of the tax deed and decree mentioned in the complaint, but denies the invalidity of that tax deed and all allegations of fact tending to show it invalid; also denies all allegations of fraud, irregularity and illegality, in connection with the suit, in the affidavit for service of summons by publication, or in the proceedings leading up to the decree, and the invalidity of the decree itself.

The second defense is that plaintiff failed, before suit commenced or at all, to tender the taxes due and paid by it, for which the lands were sold, upon which sale the tax deed in question issued.

For a third defense, it is answered that the county of Washington, Colorado, is a body corporate and politic, with power to purchase and hold real estate for the use of the county, and to sell and convey any real or personal estate owned by the county, to make orders respecting the same, and to make all contracts and do all other acts in relation to its property and concerns necessary to the exercise of corporate or administrative powers. That on the 26th day of October, 1896, at the tax sale of property held for the collection of taxes for 1895, the premises described in the complaint were bid off by the treasurer for the county of Washington, after having been offered for sale the first day and re-offered on the next day, until the treasurer was satisfied that no sale thereof could be made, and a tax sale certificate of purchase was issued therefor to said county; that thereafter, in January, 1901, upon application of defendant to purchase the said certificate, the county sold it to the defendant and authorized the county clerk to make an assignment thereof;

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and that thereafter a treasurer's tax deed, executed in manner and form as provided by law, was made and delivered to the defendant, and the same was on the 21st day of February, 1901, filed for record in the office of the county clerk and recorder. Also in this defense it was alleged, "That on the 21st day of July, 1902, a decree was entered in the county court of Washington county, Colorado, quieting in the defendant its title to the said premises under the foregoing deed."

Demurrers were filed to each the second and third defenses, which were sustained. The cause went to trial upon the issues made by the complaint and the first defense. Plaintiff had judgment, cancelling defendant's alleged tax title, and vacating, setting aside and holding for naught the decree of the county court purporting to quiet title in it. The defendant brings the cause here for review on appeal.

The proofs fix in plaintiff the fee simple title to the land. His ownership and right of exclusive possession are not debatable, unless, by virtue either of the tax deed or the former decree of the county court, defendant has drawn to itself title to, and right of possession of, the land.

The demurrer to the second defense, which alleged failure by plaintiff to tender the taxes paid by defendant, was properly sustained. That question is not an open one. It is settled by this court in the cases of *The Empire Ranch and Cattle Company v. Lanning*, 113 Pac. 491, and *The Empire Ranch and Cattle Company v. Bender*, 113 Pac. 494.

The third defense was wholly insufficient, and the demurrer was properly sustained to it. The defense shows affirmatively that the tax deed therein set out was issued on a certificate of sale to the county for land which was only offered on the first and second days of the general tax sale, namely, on the 19th and

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20th days of October, 1896, and struck off to the county on the 26th of that month. There is no averment that it was offered on the intervening days of the sale, or that the day upon which it was struck off was the last days of the sale. In absence of such showing, a compliance with the requirements of the statute is not made out. The defense for these reasons was therefore hopelessly defective, and other matters raised thereby need not be considered.—*Charlton v. Kelly*, 7 Colo. App. 301; *Charlton v. Kelly*, 24 Colo. 273; *Charlton v. Toomey*, 7 Colo. App. 304; and *Bryant v. Miller*, 48 Colo. 192.

In connection with the third defense it was further alleged: "That thereafter, to-wit, on the 2nd day of July, 1902, a decree was entered in the said county court, quieting in defendant its title to the said premises under said deed." These matters may all be accepted as true, and still sufficient is not stated in this plea to affect the rights of plaintiff or put him to answer. It does not even appear therefrom that the plaintiff, or any one through whom he claims, was a party to that suit.

The two remaining questions are: First. Is the tax deed, upon which the defendant relies for title, good on its face? Second. Of what force and effect is the decree of July 2, 1902, of the county court, in favor of defendant, which attempts to quiet its title as against the plaintiff upon alleged service of summons by publication?

The tax deed shows the sale of the land to the county to have occurred October 26, 1896, and that the county clerk assigned the certificate to the defendant on January 23, 1901, more than four years after the sale and after the issuance of the certificate. It is the duty of the treasurer to make the certificate at the conclusion of the sale, and in the absence of a showing to the contrary it will be presumed that that

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officer did his duty. The clerk had no authority to assign the certificate after the lapse of three years, and the assignment was void. An assignment was essential to issuance of deed. A deed executed upon a void assignment is itself void and conveys no title. The tax deed is, therefore, upon its face, a nullity. *Lovelace v. Tabor M. & M. Co.*, 29 Colo. 226; and *Carnahan v. Sieber Cattle Co.*, 34 Colo. 257.

The decree of the county court of Washington County, purporting to quiet title in the defendant to the land in question, was entered on an attempted service of summons by publication. To obtain an order for such service an affidavit to that end must show, among other things, that the defendant resides out of the state, or that he has departed from the state without intention of returning, or conceals himself to avoid service of process; it must also give his postoffice address, if known, or if unknown, show that fact. The affidavit is barren of any direct statement of non-residence, and is silent on the question of the departure of the defendant from the state without intention of returning, or of his concealment to avoid service of process, and the matter of postoffice address is not mentioned. The law is settled that to give the court jurisdiction the requirements of the statute must be strictly complied with. It must contain the showing required by statute, and nothing excuses omissions or insufficient statement. 1 Black on Judgments, 2nd Ed., Sec. 232; *Trowbridge v. Allen*, 48 Colo. 419; *Clayton v. Clayton*, 4 Colo. 410; *Israel v. Arthur*, 7 Colo. 5; *Brown v. Tucker*, 7 Colo. 30; *O'Rear v. Lazarus*, 8 Colo. 608; *Beckett v. Cuenin*, 15 Colo. 281; *Slyph M. & M. Co. v. Williams*, 4 Colo. App. 345; and *Cheely v. Clayton*, 110 U. S. 701.

The foregoing defects in the affidavit are affirmatively disclosed by the record, and it thus appears that the affidavit is wholly insufficient to support an order

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for publication. No jurisdiction of the person was acquired, and the judgment entered under such circumstances is a nullity. A void judgment is without force and is entitled to no respect whatever, and may be collaterally attacked by any one with whose rights and interests it conflicts. In this view it is immaterial whether the attempt to impeach the judgment was direct or collateral. The plaintiff was free to assail it either way. Where a court, which undertakes to try an action and render judgment, fails to acquire jurisdiction of the person, where as here that is essential, such judgment is void.

In *Trowbridge v. Allen, supra,* this court, speaking to this precise question, had this to say:

"When, however, the record does disclose that the court did not have jurisdiction of the defendant, the judgment is a mere nullity, and may be collaterally attacked by any person interested wherever and whenever it is brought in question.—1 Black on Judgments, § 278. In such cases the recitation in the judgment or decree itself, that jurisdiction of the defendant was obtained, is not conclusive of that fact, if the judgment roll or entire record of the case shows affirmatively to the contrary.—17 Ency. Law, 1082; 1 Black on Judgments, § 273."

It is urgently argued, that under section 44 of the code, which reads: "From the time of filing the complaint, or the service of summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings," the court acquired such jurisdiction of the cause and of subsequent proceedings that any order or finding thereafter made by it, including that of passing upon the sufficiency of the affidavit to warrant the order for service of summons by publication. was in the exercise of jurisdiction, and therefore, if wrong, made the judgment erroneous merely, not void, and thus subject

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to attack in a direct proceeding only. We cannot consent to this contention, for followed to its logical conclusion it would permit of judgments being rendered upon the mere filing of the complaint, and make them impregnable of attack, except directly, because entered in the exercise of jurisdiction thus acquired. If the code provision must be given that construction, than it is clearly obnoxious to both the state and federal constitution, for such holding would permit the taking of property without due process, without notice, and without a day in court. The section must be given its common-sense and reasonable meaning, considered in connection with other provisions of the code. In this view, manifestly it means that the filing of a complaint gives the court jurisdiction of the subject-matter of the action, not of the person; otherwise what necessity for the issuance of summons at all, or service thereof, or of any affidavit to procure an order for constructive service? When the affidavit was filed, and an order for publication made, by the clerk, not by the court, those were but steps in acquiring jurisdiction of the person. The affidavit was the thing, indeed it was the only thing, when followed by a proper publication, which could give jurisdiction over the person and enable the court to make any order, or to do anything at all, to affect his rights or bind him. The affidavit was jurisdictional, and unless sufficient, gave the court no authority whatever.

If there were an entire absence from the record of an affidavit, that is, if the record were silent on this proposition, then it would be presumed, in favor of the judgment, that what ought to have been done had not only been done, but properly done.—*Van Wagenen v. Carpenter*, 27 Colo. 444; *Burris v. Craig*, 34 Colo. 383; *Farmers' Union Ditch Co. et al. v. Rio Grande Canal Co. et al.*, 37 Colo. 512; and *Mortgage*

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Trust Co. v. Redd, 38 Colo. 458. Since, however, the record affirmatively shows what was done in the matter of filing an affidavit, it will not be presumed that something different or additional was done, for that would be to contradict, by presumption, a fact the existence of which is disclosed by a mere inspection of the record.—1 Black on Judgments, 2nd Ed., Sec. 277; *Galpin v. Page,* 18 Wall. 350; *Messinger v. Kintner,* 4 Bin. (Pa.) 97; *Blanton v. Carroll,* 86 Va. 539; *Penobscot R. Co. v. Weeks,* 52 Me. 456; *Dillard v. Central Virginia Iron Co.,* 82 Va. 734; *Pollard v. Wegener,* 18 Wis. 569; and *Hahn v. Kelly,* 34 Cal. 391.

The record itself shows that there was filed in the cause an affidavit, purporting to lay the foundation for an order for service of summons by publication, which affidavit is in fact wholly insufficient to give the court jurisdiction to proceed to personal judgment against the defendant, and there is, therefore, no room at all for presumption as to this matter, for the court is bound by the affirmative record showing. This court has already held, in effect, in *Trowbridge v. Allen, supra,* that recitals in the judgment and decree will not be permitted to control, where they contradict or conflict with matter which elsewhere affirmatively appear in the record.

The fundamental error of the court was in assuming jurisdiction, upon a record which affirmatively disclosed that jurisdiction of the person had not attached. Absence of legal service is jurisdictional. The right to attack a judgment collaterally for jurisdictional infirmity, that is, error in assuming jurisdiction, is definitely settled here.—*Wilson v. Hawthorne,* 14 Colo. 530; *Mortgage Trust Co. v. Redd, supra;* and *Great West M. Co. v. Woodmas of Alston M. Co.,* 12 Colo. 46.

The court acquired no more jurisdiction over the person, upon the filing of the complaint under section 44 of the code, than it did upon a like filing under the

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provisions of the code as it formerly stood. This court has held in effect, times almost without number, that each step required to be taken by the code to give jurisdiction of the person, upon constructive service, must be taken in strict compliance with the requirements thereof, else the judgment rendered thereon is void, and this is precisely the situation in this case.

The judgment and decree is in all respects right, is fully warranted by the law and facts, and is, therefore, affirmed.

Judgment affirmed.

Decision *en banc.*

CHIEF JUSTICE CAMPBELL dissenting:

With the conclusion on that branch of the case which pertains to the decree of the County Court of Washington County I cannot agree. That the present attack thereon is collateral is plain; indeed, is not gainsaid. The decree is adjudged by this court to be void on the ground that defendant therein was not served with summons. An attempt, at least, to do so by publication was made, but this court says that the affidavit on which the order therefor was based does not conform to the pertinent code requirement. There is a well recognized distinction in the law applicable to direct and collateral attacks on judgments. When the attack is direct, evidence *dehors* the record to show lack of jurisdiction is permissible; when it is collateral, the record alone must be looked to. If, as the opinion says, the record *affirmatively* shows that no sufficient supporting affidavit for the order of publication was filed, then the conclusion inevitably follows that the decree based upon such attempted service is void. But it is just here that I take issue with the opinion. There

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is a marked difference between an affirmative and a negative showing. For example, if this decree was being reviewed in an appeal therefrom, a direct attack, the certificate of the clerk of the trial court to the transcript would exhibit to the reviewing court every order made below, and every paper filed in the cause, and the authentication by the judge of the bill of exceptions would disclose all the evidence introduced. If no affidavit at all was included in the record, or an insufficient one for the order of publication was thus brought up, the reviewing court would necessarily hold the judgment void. This showing, however, would be a negative showing of its invalidity. If this was a suit in equity to set aside or cancel the decree because it was rendered without notice to defendant, evidence *dehors* the record to impeach it would be admissible, and if the proof was clear that what purported to be a sufficient affidavit found in the files was, as matter of fact, a forgery, or not filed until after the judgment was rendered, this would be an affirmative showing and would justify a cancellation. If, in this collateral attack, the recitals in the decree included in the record plainly and unquestionably identified the defective affidavit as the only one on which the order was granted, this would be an affirmative showing and sufficient to invalidate the judgment. But the case at bar, a collateral attack, is different from either of the ones supposed. Here the trial judge recites in the decree that an affidavit was filed containing the things which the code prescribes. A defective one is found in the files when, years later, the clerk authenticates the transcript. Evidently it was not the one recited by the judge, for they materially differ. We should, therefore, presume that the defective one was rejected and ignored and that subsequently a good one was filed on which the order was made, and that, in the lapse of time, it has been lost or mislaid. In the *Farmers*

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Union Ditch Company case *supra* this court held that the entire absence from the files and record of a required affidavit is not, in a collateral attack on a judgment, an affirmative showing of its invalidity. By precisely the same reasoning, and on principle, the mere presence of the defective affidavit in this record is, at most, a *negative* showing, when, as here, the recitals and findings made by the trial judge in the decree declare that a required and sufficient statutory affidavit was filed. In the *Farmers Union* case this court indulged the presumption, in order to give verity to the decree, that a sufficient and proper affidavit was in fact filed, though at the time the record was authenticated no affidavit was found among the papers in the cause. In the case at bar this court, for the same reason, should now indulge the presumption that in addition to the defective affidavit found, another and sufficient one was seasonably filed upon which the order was based, in view of the recitals in the decree referred to. Certainly the positive findings of the trial court, which are embodied in the decree, are not, as a species of evidence, inferior to the negative showing resulting from the presence of a defective affidavit, or the absence of a proper one. There is nothing in this record which *affirmatively* shows that a proper and additional affidavit was not filed which the recitals in the decree say was presented to the court when it judicially determined that due service of summons by publication was made. Indeed the presence of this defective affidavit is not at all inconsistent with the fact that, at the appropriate time, another and good affidavit was filed on which the order was based. And, on this collateral attack, in order to give due credit and faith to a judgment of a court of competent jurisdiction, which the County Court of Washington County is in a case of this character, this court should say that the record now before it does not *affirmatively* show its in-

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validity. The opinion overlooks, if it does not ignore, that different rules as to proof apply to direct and collateral attacks on judgments. It is directly contrary to the very cases from this court on which it purports to be founded, particularly to *Van Wagenen v. Carpenter*, *Farmers Union Ditch Co. v. Rio Grande Canal Co.*, and *Burris v. Craig* therein cited.

Decided June 5, A. D. 1911; rehearing denied October 2, A. D. 1911.

[No. 6418.]

EMPIRE RANCH AND CATTLE COMPANY V. JONES.

Judgment affirmed on authority of *Empire Ranch &c. Co. v. Coldren, ante*—(115).

Appeal from Washington County Court—HON. C. W. BALLARD, Judge.

Mr. R. H. GILMORE and Mr. J. C. GUNTER for appellant.

Mr. ISAAC PELTON and Mr. E. T. WELLS for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court.

The action, wherein appellee was plaintiff and appellant was defendant, was to remove cloud from title, created, as is alleged, by a void tax deed and a void decree entered in the county court of Washington County, Colorado, on the 2nd day of July, 1902, on constructive service, which assumed to quiet title to the land in the defendant. The judgment and decree was for plaintiff and defendant brings the case here for review on appeal.

On the authority of the decision in the case of *The*

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Empire Ranch and Cattle Company vs. Coldren, just announced, the title of plaintiff being unchallenged in argument, the judgment must be affirmed, as the issues involved in the two cases are practically identical.

The judgment is affirmed.

Decision *en banc.*

[No. 6422.]

MUND, ADMINISTRATOR, V. ADOLPH REHAUME, ET AL.

1. BILL OF EXCEPTIONS—*What to Contain*—The successful party, desiring to assign cross-errors upon the exclusion of evidence offered in his behalf, may require that the evidence so excluded be inserted in the bill of exceptions of his adversary—(134).

2. APPEALS—*Cross-Errors*—Where no cross-errors are assigned the appellee will not be permitted to argue errors alleged to have been committed against him—(133).

3. ——*Abstract*—If the appellee desires to be heard as to the admissibility or effect of evidence offered on his part in the court below, it must be presented in the printed abstract—(133, 134).

4. FRATERNAL SOCIETY—*Benefit Certificate*—A fraternal order, the death of a member in which entitles his surviving kin to certain benefits, is, for the purpose of determining who is entitled to the benefit, treated as a mutual insurance company, and the certificate of membership as a policy of life insurance, and, so far as possible, as the last will of the member. The policy measures the rights of the parties. The beneficiaries take thereunder, and not by inheritance—(135).

5. ——*Construction of the Certificate*—Where no beneficiary is named in the certificate the member is deemed to accept as the beneficiary thereunder, those designated in the constitution of the order, and this is to be construed according to the ordinary and common use of the word found therein. Technical definitions are not controlling. Therefore where the constitution of the order provided that if the member left no widow, child, or grandchild, the benefits should be paid "all to one parent if only one be living." *Held*, that the father was the beneficiary, though by the law of the domicile the marriage, of which the deceased was begotten, was absolutely void. The incapacity of

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the son to transmit to the father was held not the test—(135, 136).

6. ——*Beneficiaries*—Who are eligible as beneficiaries is determined by the laws of the state where the society is organized—(136).

7. STATUTE—*Territorial Effect*—A statute under which a fraternal order is organized determines who shall be eligible as beneficiaries under its certificate, even where the certificate is issued by the head lodge and delivered by a subordinate lodge as its agent in another state—(136).

8. ——*Legitimizing Statutes*—A statute which legitimates cestuous, and void, without judicial sentence, attends the child ous, and void, without judicial sentence, attends the child where wherever he goes and makes him legitimate through life—(136).

Appeal from Denver District Court.—HON. HUBERT L. SHATTUCK, Judge.

Appellees (plaintiffs) had judgment below. Defendant (appellant), brings the case here on appeal.

June 19, 1866, at Fond du Lac, Wisconsin, Usebas Parent married his niece by the half blood, Mary Rehaume, daughter of his half sister. The marriage was regular and in good faith, but null. They ate, slept, lived and kept house together, and in June moved to Minnesota, where October 27, 1866, a son was born to them within the wedlock of the marriage, called Adolph. The Wisconsin statute forbade and nullified the marriage. It provided that no marriage should be contracted between parties nearer of kin than first cousins, computed by the rule of the civil law, whether by the whole or half blood; and that all marriages prohibited on account of consanguinity, solemnized within the state, should be absolutely null and void without a divorce, but that the issue of all such marriages should, nevertheless, be legitimate. In Minnesota and Montana the statutes were the same in substance. The Wyoming statute provides: Upon the dissolution by decree of any marriage prohibited on account of consanguinity between the parties, the issue of the mar-

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riage shall be illegitimate. The son, Adolph, settled in Douglas, Wyoming, where he assumed the name of Edward A. Martin.

The Head Camp, Pacific Jurisdiction, Woodmen of the World, is a fraternal life insurance company, on the lodge plan, with a secret ritual, doing business in the western states, incorporated under the laws of the state of Colorado, with principal office, place of business, and Head Camp, at the City and County of Denver; and one of its objects being to insure the lives of its members. Adolph Parent, under the assumed name of Edward A. Martin, October 24, 1901, at Douglas, Wyoming, joined Fetterman Camp No. 244 of the order, and received certificate No. 112380, for $2,000.00; the loss being payable to the beneficiaries designated in the constitution of the order. Section 119 of the constitution of the order, in such cases, provides death benefits shall be payable as follows:

"If the deceased leaves a widow and no children or grand children, to his widow; if a widow and descendants, one-half to his widow and the remaining one-half divided equally among his children, the children of a deceased child to take collectively what their parent would have received, if living; if no widow or descendants, to his parents in equal part or all to one parent if only one be living; if no widow, descendants or parents, then to his brothers, sisters and descendants of deceased brothers and sisters, the latter to take collectively what their parents would have taken if living; if none of said relatives are living, then to the grand parents, uncles and aunts in equal portion; if none of said relatives survive, the benefits in such case shall be forfeited and remain in the benefit fund."

Martin died in good standing in the order, at Billings, Montana, March 25, 1905, where he had lived three years immediately preceding. His father furnished satisfactory death proof to the company, and

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claimed to be the sole beneficiary under the certificate, the mother having died in 1882. Appellees, uncles and aunts of the insured, also claimed the money as sole beneficiaries, and brought suit against the company in the district court of the City and County of Denver. The company filed a bill of interpleader, paid the money into court and asked to be discharged; whereupon, by agreement, Usebas was substituted as defendant. In this court, he having died, his administrator, Mund, was substituted. It is not admitted that any parties to this action are beneficiaries; still it is admitted there are no other beneficiaries living except the parties to the action, and that the money on deposit with the clerk may be awarded to either the plaintiffs or defendant, as the facts admitted or established by the evidence, may warrant. The question is, who are the beneficiaries under the constitution of the order? The district court found that Usebas Parent was not the parent of the insured, and for that reason was not, and could not be the beneficiary, though he was the father; that the appellees, uncles and aunts of the insured upon his mother's side, were the beneficiaries, and entered judgment accordingly.

Messrs. VAN CISE, GRANT & VAN CISE for appellant.

Mr. ROY C. HECOX and Messrs. ELLIOTT & BARDWELL for appellees.

Mr. JUSTICE GARRIGUES delivered the opinion of the court.

1. We will first consider a matter of practice. Plaintiffs offered in evidence voluminous depositions, which were excluded. They also offered parts of the stipulation and sections 4864 and 4858 of the statutes of Wyoming, which were excluded. The findings and judgment of the court were based on the evidence ad-

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mitted. The bill of exceptions tendered by the defendant contained all the admitted, but none of the excluded evidence offered by plaintiffs. Upon plaintiffs' objection, on this account, the judge stated it was the practice to put every word into the bill of exceptions taken down by the stenographer in his notes. So the defendant to get the bill signed, was obliged, though under protest, to put in it the offered, but excluded evidence of plaintiffs, and the clerk has incorporated bodily the excluded depositions into the transcript of the record. Counsel for appellees have argued this excluded evidence, and appellant has filed a motion to strike this portion of the argument.

The decree prepared by plaintiffs' counsel and signed by the court without their objection or exception, finds:

"5. That this cause is to be and is determined entirely upon the allegations contained in the first cause of action in the complaint herein, and without any reference to the said second cause of action, for the reason that the said benefit certificate is not ambiguous in its terms, and that therefore the testimony contained in the depositions herein is not competent to vary or explain the meaning of the terms used in the said benefit certificate."

The evidence offered by plaintiffs, and excluded, was in support of this second cause of action. The Judge's certificate recites that the bill of exceptions contains not only all the evidence admitted, but also all the evidence offered and excluded. Appellant's abstract does not contain any of appellees' excluded evidence. Appellees have filed no supplemental or additional abstract, and have filed no cross errors nor any assignment of error. Appellant complains of being required to insert appellees' excluded evidence in the bill of exceptions.

Plaintiffs were successful; won all they asked,

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and, if satisfied, there was no occasion for including in the bill of exceptions their excluded evidence. But our code provides appellees could assign cross errors on the record filed by appellant. Appellees might be dissatisfied with the rulings of the trial court, though the judgment was in their favor. The case might be reversed and remanded for a new trial. Anticipating this, appellees might desire the opinion of this court upon the ruling of the lower court in excluding the offered evidence. If the judgment is affirmed, cross errors, in such a case, become mere moot questions of law. But if the case is reversed and remanded for a new trial, the opinion of the appellate court upon the assignment of cross errors would be a guide to the lower court on a retrial of the case. When the defendant tendered his bill of exceptions without this excluded evidence, it was proper for plaintiffs to ask to have it inserted if they desired to assign cross errors thereon. Plaintiffs (appellees could not appeal from the judgment in their favor, and inasmuch as the code allows them to assign cross errors on the record filed by appellant, it would be unfair to allow appellant to so prepare the record that appellees could not, though they expressed a desire to the lower court to do so, file cross errors thereon. Appellees have assigned no cross errors, filed no supplemental or additional abstract, and cannot be heard on this excluded evidence. —*Rio Grande South. R. R. Co. v. Colo. Fuel & Iron Co.*, 41 Colo. 4; *Seyfried v. Knoblauch*, 44 Colo. 86; *Golden Age No. 2 M. & M. Co. v. Langridge*, 39 Colo. 158.

It was improper for appellees' counsel to mention it, or base an argument upon it, and the motion to strike will be sustained.

2. The Head Camp, Pacific Jurisdiction Woodmen of the World, for the purposes of this case, must be treated as a mutual life insurance company; and the benefit certificate as a life insurance policy, which the

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courts, in construing, treat, as far as possible, as a will or testament. The policy is the contract upon which the suit is based, and measures the rights of the parties. The beneficiaries take under contract and not by inheritance.—*Chartrand v. Brace,* 16 Colo. 19.

No specific beneficiary is named in the policy. The insured accepted the beneficiaries designated in the constitution of the order. No one outside of the class designated is eligible as a beneficiary. The mother was dead when the policy was taken out, and the question is, who are the beneficiaries? If the father and mother within the meaning of the contract are the parents of the insured, the money is all payable to the father as the only surviving parent. The insured was born within the wedlock of a marriage, and was legitimate by statute, though the marriage was void without a divorce. We are not dealing with an illegitimate, but with a legitimatized child born within the wedlock of a marriage contracted in good faith, but void without a decree of court. The lower court went upon the theory that if the son could not transmit to the father under the technical laws of inheritance, then the father was not his parent and could not be a beneficiary. This is not the proper test. The proper construction of the contract, and not the law of inheritance, fixes the rights of the parties. The word " parents," if we accept the ordinary and common use of words, should be construed to mean the father and mother of the insured, under the circumstances of this case. The technical definitions of the words father, mother, child and parent, found in law dictionaries, are not controlling in this contract. Technically, water is a mineral, but no court would think of giving it that construction in a mining contract. The laws of the order should be liberally construed according to the ordinary and common use of words. Our statutes provide that all words, unless the intention was to use them in their technical sense, shall be understood and construed according to

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the approved and common usage of the language. Parent is a common word, and the court in construing this contract, should give it its common meaning. The dictionaries Webster, Worcester, The Standard and The Century, define it to be: "He that begets;" " She that bears young;" "A father or a mother." Applying the common meaning of the word to the facts in this case, it should be construed to mean the father and mother of the insured.

3. The eligibility of beneficiaries in orders of this kind, is determined by reference to the laws of the state where the association is organized. The local Camp at Douglas, Wyoming, was the agent of the Head Camp at Denver.—*Johanson v. A. O. U. W.*, 31 Utah 45, 86 Pac. 494; *Grimme v. Grimme*, 101 Ill. App. 389. The legitimation statutes made the insured a legitimate child, which status remained with him through life, wherever he went.—*Watts v. Owens*, 62 Wis. 517; *Dyer v. Brannock*, 66 Mo. 391; *Simsbury v. East Granby*, 69 Conn. 302; *McGunnigle v. McKee*, 77 Pa. St. 81; *Hartwell v. Jackson*, 7 Tex. 575; *Ives v. McNicoll*, 59 O. St. 402; *Binns v. Dazey*, 147 Ind. 536; 5 Cyc. 636, 642; *Henry v. McNealey*, 24 Colo. 456; *Fowler v. Fowler*, 131 N. C. 169.

The insuring company, by filing an inter-plea, waived any objection it had to the right of either party being designated as beneficiaries. As heirs of the insured, appellees can raise no objection to appellant's eligibility as a beneficiary. Appellees do not claim the fund as heirs, but as the beneficiaries, themselves. They admit the laws of inheritance are not applicable, but, by analogy, argue the father, not being the parent, does not belong to an eligible class of beneficiaries. If the mother was not a parent, her collateral kindred are not eligible as beneficiaries. Their standing of eligibility depends upon the parentage of the mother. This of necessity drives them to the position that the

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mother was a parent. How the mother could be a parent of a child begotten by a putative father who is not its parent, is beyond our conception. The appellees are the brothers and sisters of the mother of the insured, and their standing as beneficiaries is based upon the claim that they are his uncles and aunts, which claim is necessarily founded upon the parentage of the mother, and of necessity includes the parentage of the father.

It was agreed the court should award the fund to either plaintiffs or defendant, as the facts established by the evidence might warrant. Under the evidence, the court should have awarded it to the defendant. The case is therefore reversed and remanded with directions to the lower court to enter a judgment awarding the fund to the defendant. *Reversed.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE MUSSER concur.

[No. 6448.]

LEWIN V. THE PEOPLE.

CRIMINAL LAW—*Intoxicating Liquors—Illegal Sale—Who Chargeable*—One is not to be charged with the sale of intoxicating liquors, on Sunday, at a licensed tipping house, in violation of the statute, merely because the license issued to the tipping house was issued in his name, and so still stood of record, at the time of the commission of the offense. If in fact he had assigned the license, and had no control of, or connection with, the place, he is not chargeable, even though the license was not in law assignable—(139).

The fact that the license issued to him, and stands in his name, is competent evidence to prove his connection with the place, but is not conclusive—(139, 140).

Error to Denver County Court—HON. GRANT L. HUDSON, Judge.

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Mr. ALFRED MULLER, Mr. GUY K. BREWSTER and Mr. H. H. HINDRY for plaintiff in error.

HON. BENJAMIN GRIFFITH, attorney general, Mr. GEORGE D. TALBOT, for the people.

Plaintiff in error, defendant below, was charged with violating the statute relating to the sale of liquors on Sunday—§ 1346d, Mills' Stats., Rev. Supp. He pleaded not guilty. The trial was to the court. The testimony established that the saloon named in the information, located at 2400 Larimer Street, in the City and County of Denver, was open on Sunday, and liquor sold therein. The testimony on behalf of the defendant was, that he had sold this saloon to The Louisville Liquor Company something like two years previous to the date of the alleged violation of the law, at which time he transferred his license to sell liquor at that place to the purchaser, and since that date had not been connected with the saloon in any capacity whatever. In transferring his license the defendant used the regular form of blank provided for such transfers by the Fire and Police Board. This transfer was lost, but it appears that the defendant was not aware of the fact that the license still stood in his name until about two weeks prior to the violation of the law, as charged, occurred, when he made out another transfer, in accordance with the rules and requirements of the Fire and Police Board. It appears, however, that at the time of the alleged violation of the law the license to sell liquor at the saloon in question still stood in his name.

The trial court adjudged the defendant guilty upon the theory that the mere fact that the license issued for the saloon named in the information was in his name when the law was violated rendered him criminally responsible for the violation of the law at that place, as charged, irrespective of whether or not he had any in-

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terest in or control over it. Upon this subject the trial court said:

"No matter whether he be the owner of the place or not, if the license stands in his name, he stand before and between the people of the State of Colorado and its officers, and guarantees the lawful operation of that place."

"It is not necessary, in order to convict a man, that a saloon shall be owned by the defendant. In the opinion of this court, if the license stands in his name, he thereby is a guarantor to the people of the State of Colorado as to the conduct of the affairs of that saloon, and he is responsible for any violations of the law."

Other rulings were made by the trial court from which it appears, beyond question, that defendant was adjudged guilty because the license stood in his name, and that the testimony bearing on the subject of sale and transfer was entirely ignored, and expressly regarded as immaterial.

Mr. JUSTICE GABBERT delivered the opinion of the court.

The judgment of the trial court was not based upon facts determined from conflicting evidence, as contended by counsel for the People, but upon a misconception of the law relative to the facts necessary to establish in order to justify the conviction of the defendant. He could not be convicted of the violation of the law charged unless it appeared that he was the owner, or in control of, or at least connected in some capacity with the saloon in question. The trial court expressly ignored these vital questions of fact, and found the defendant guilty solely on the ground that the license stood in his name. This was error. That the license stood in the name of the defendant was competent to prove that he was connected with the saloon in such capacity as would render him amenable for

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the violation of the law as charged, but not conclusive of that question, as ruled below, in the face of the testimony that he had sold the place two years previous, and since that date had not been interested or engaged in, or connected with, it in any capacity whatever.—*Mead v. Ph. Zang Brewing Co.*, 43 Colo. 1.

On behalf of the people it is urged that a license to sell liquor is a personal privilege, and cannot be assigned or transferred. This question is not involved. It might be material to consider in a case where the assignee of a license was being prosecuted for selling without a license.

The judgment of the County Court is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE HILL concur.

[No. 6482.]

ALEXANDER ET AL. V. CITY AND COUNTY OF DENVER.

CONSTITUTIONAL LAW—*Special Assessments of Benefits*—The levy of an assessment upon lands, for a benefit occasioned by a public improvement is the exercise of the power to tax. The provisions of Sec. 15 of Article II of the Constitution have no application thereto—(145).

Though such assessment is made in a proceeding under the statute of Eminent Domain, and is declared a lien upon the lands not taken, it does not result in depriving the land owner of the damages to which he is entitled for land taken, nor any part of such damages—(145).

Neither does the fact that what is to be paid to the land owner for the land taken is raised by a general tax of which, with all other property owners, he must pay his share, have this effect—(145).

The provisions of the statute, (Mills Stat. Secs. 4419, 4427, Rev. Stat. Secs. 6592, 6600,) are not opposed to the Constitution —(146).

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Error to Denver District Court—HON. P. L. PALMER, Judge.

Mr. WM. T. ROGERS, attorney for plaintiffs in error.

....Mr. HENRY A. LINDSLEY and Mr. THOS. R. WOODROW, attorneys for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court.

The City and County of Denver, as petitioner, instituted proceedings to acquire, by right of eminent domain, tracts of land belonging to the plaintiffs in error, to open, widen and extend certain streets and alleys. The commissioners appointed for the purpose assessed the value of each tract taken at specified sums, and also determined the value of the benefit which would accrue to each of the tracts remaining. The amount of benefits was less than the value of the land taken. The report of the commissioners, with some slight modification, was approved by the court, and a decree entered, to the effect that upon payment to the respective respondents of the several sums awarded for the value of the several tracts taken the petitioner should become the owner of such tracts and entitled to enter upon, hold and use the same for public highways; and that the special benefits assessed should severally be a lien against the respective tracts from which the land for highways was taken. The difference between the value of the land taken and the special benefits was assessed against petitioner. The respondents have brought the case here for review on error.

On their behalf the proposition raised is, that assessing the lands of respondents with the value of the special benefits accruing by reason of the improvements, violates section 15 of Article II of our Constitution, which provides: "That private property shall

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not be taken or damaged for public or private use without just compensation." The Charter of the City and County of Denver, § 322, provides that for the purposes of opening or widening any street, alley or other public highway, the right of eminent domain may be exercised, and that "the manner of proceeding, the ascertainment of the compensation to be paid, the assessment of benefits or damages, the collection of such benefits and payment of such damages, shall be as provided by general law."

Turning to the General Laws on the subject, we find, § 6592 Revised Statutes: "It shall be the duty of the commissioners to estimate the actual value of the land and premises proposed to be taken, without reference to projected improvement, and the actual damage done to the property thereby, and for the payment of such values and damages, to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be especially benefited by the proposed improvement, in the opinion of the commissioners, to the amount that each lot of said owner shall be benefited by the improvement, the sums to be paid by the owners of property especially benefited by the improvement as ascertained by the commissioners shall be a lien on the property so charged and shall be collected as provided by ordinance of said city, and when collected shall be paid into the city treasury as a separate fund to be used exclusively for the payment of the damages awarded."

Section 6600 *ibid* provides, in substance, that when the report of the commissioners shall have been approved, the city council shall make an appropriation for the payment out of the city treasury of all damages assessed in favor of the owners of the property appropriated, and that the proper city officials shall there-

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upon issue the warrants of the city to the respective parties entitled thereto.

Respondents do not claim that their property is not respectively benefited to the extent of the respective amounts assessed against their several tracts, nor do they raise any question with respect to the method which the ordinances of the City and County of Denver may provide for the collection of the several amounts assessed against their several tracts. So that the question to determine is, does the decree providing that the amount of the special benefits shall be a lien upon the remainder of their lands, which, if sustained, they must discharge, result in taking their property for a public use without just compensation? The decree appears to follow the provisions of the statute above quoted.

Counsel contends that this statute is unconstitutional for the reason that respondents are entitled to be paid the value of the land taken, in money, and that this value cannot be liquidated by any benefits accruing to them by the appropriation. In support of this contention, it is urged that benefits cannot be off-set against damages awarded for the value of the land taken. This does not accurately present the real situation. The decree provides that the respondents shall be paid the damages representing the value of the land taken, as a condition precedent to the acquisition of title by petitioner, so that the vital question is the validity of the special assessments, which the respondents are required to pay. Counsel for respondents say these assessments are invalid because thereby the damages they receive are reduced *pro tanto*. We do not regard this contention as tenable. The levy of an assessment for a special benefit is an exercise of the power to tax, while the clause of the constitution inhibiting the taking of property for a public use without just compensation refers simply to property taken by right

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of eminent domain, and has no reference to the collection of taxes.—*Nichols v. City of Bridgeport,* 23 Conn. 189; *Wight v. Davidson,* 181 U. S. 371; *Bauman v. Ross,* 167 U. S. 548; *Hayden v. City of Atlanta,* 70 Ga. 817; *Hessler v. Drainage Commrs.,* 53 Ill. 105; *People ex rel. Griffin v. Mayor of Brooklyn,* 4 N. Y. 419.

The question, then, is, does the levy of the special assessments result in depriving respondents of the damages which they are entitled to receive for the land actually taken? We think not.

The right of eminent domain cannot be exercised except upon condition that just compensation shall be made to the owner. The just compensation required by our Constitution to be made to the owner is the loss sustained by him by the appropriation. He is entitled to receive the value of what he has been deprived of, and nothing more. *Bauman v. Ross, supra; Livingstone v. Mayor,* 8 Wend. (N. Y.), 85. If, by a public improvement, the residue of his land is specially enhanced in value, it would be manifestly unjust to the public to allow him to enjoy this increase in value without consideration, and also to receive the full value of the part taken. To avoid this inequality, special assessments, when the facts justify, may be levied to meet the cost of public improvements, upon the ground that the property upon which they are imposed is peculiarly benefited by such improvements, and that, therefore, the owner does not, in fact, pay anything in excess of what he receives by reason of such improvements.—*Norwood v. Baker,* 172 U. S. 269; *City of Denver v. Kennedy,* 33 Colo. 80.

If, by taking part of a tract, the residue is specially enhanced in value by the public improvement for which such part is taken, there is no reason in law why, in such circumstances, the owner of such residue should not be required to pay in the way of a special assessment the amount which will represent such spe-

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cially increased value, the same as those whose property is specially benefited by a public improvement, no part of which is taken for that purpose, may be required to pay for special benefits. In this respect he stands upon the same plane with other property owners whose property may be burdened with a special assessment for a public improvement when the facts justify it.

The decree in the case at bar provides that respondents shall be paid the value of the land taken as a condition precedent to the acquisition of title by petitioner. The amount of benefits is not set off against this value. It is made a lien against their lands, but they are to receive, in the first instance, the damages awarded for the lands taken. True, the amount of money respondents will have received for damages will be lessened to the extent of the special assessments they are required to pay; but these payments are exacted for an independent consideration, namely, the specially enhanced value of their property by reason of the establishment of highways over the ground appropriated to these purposes, and for which they are to be fully paid. Consequently, the damages they have sustained, and for which they are to be paid, are not, as a matter of fact, lessened in the slightest degree.

Summarized, this is the situation: Respondents are to receive in cash the value of the land actually taken, and are required to subsequently pay the sums representing the value of the special benefits to the residue, as the result of the use to which that taken is proposed to be put; so that it appears to a mathematical certainty, that the payment of the assessments levied for special benefits does not result in depriving them of the value of the land appropriated, and that they are fully paid for the loss occasioned by the appropriation.—*Nichols v. City of Bridgeport, supra: Bauman v. Ross, supra.*

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It is also contended by respondents that because the amount assessed against the petitioner representing the damages in excess of the special benefits must be paid by general taxation, and they must pay their pro rate share thereof in the way of taxes levied and collected for that purpose, that, therefore, they do not receive full compensation for their several tracts appropriated for public highways. The assessment against petitioner was made because to that extent the public was benefited. Respondents are part of the public, and to the extent that they are benefited, as a part of that entity, by the improvements in question, they must bear their share of the burden which the cost of these improvements has imposed. This is represented by their pro rate share of the taxes they must pay in common with other property owners to discharge the damages assessed against petitioner. This sum represents their part of the value of the general benefits which they will share in common with the public from the improvements, and therefore, in no sense can be regarded as a deduction from the damages which have been awarded them.

Authorities are cited by counsel for respondents which hold that where a property owner is found entitled to a sum of money in payment for land taken under the power of eminent domain, he is entitled to receive that sum, and that it is no payment of the same to credit or set off against such compensation benefits accruing by virtue of the appropriation, and award him, as damages, the difference. These authorities are not in point, for the reason that they have no application to the facts of the case under consideration. What we do determine is, that under the decree based upon the provisions of the statute involved, and in conformity therewith, respondents are to be paid in full for the loss occasioned by the appropriation of

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their lands, which is all that they can demand, under our Constitution.

The judgment of the District Court is affirmed.

Judgment affirmed.

Decision *en banc.*

[No. 6503.]

MONSON ET AL. V. GILLETT.

TAX DEED—*Certificate Issued to County and Assigned by County Clerk*—Under the statutes in force prior to the revenue act of 1901 (Laws 1901, c. 94) a tax deed for land sold to the county, issued upon an assignment of the certificate by the county clerk, after more than three years from the date of the certificate is void—(148).

A tax deed recited the sale of the lands to the county; that in April, 1891, the grantee deposited with the treasurer a sum mentioned; a resolution of the board of county commissioners at a regular meeting in the same month and year, that the certificate might be assigned by the clerk to the grantee in the deed, for the amount so deposited; and that "in consideration of the premises, and in accordance with the provisions of Sec. 5 of the Act of March 3, 1894," the clerk assigned and delivered the certificate to the grantee named in the deed. *Held*, that these recitals showed an assignment, not pursuant to any direction or authority of the board, but by the county clerk in his capacity as clerk, and by an authority assumed under the statute recited; and such assignment having been made more than three years after the date of the certificate, the deed was held void—(149, 150).

Appeal from Logan District Court—HON. H. P. BURKE, Judge.

Mr. W. L. HAYS for appellants.

Messrs. MUNSON & MUNSON for appellee.

Mr. JUSTICE MUSSER delivered the opinion of the court.

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In this action to quiet title, the defendants claimed the land under a title based upon a tax deed. The court held the tax deed invalid on its face and rejected it as evidence. As will be seen hereafter, it appeared on the face of the deed that the certificate of purchase at the tax sale, upon which the deed was based, was made to the county in default of bidders, and after the expiration of six years from its date the certificate was assigned by the county clerk to the grantee in the tax deed. The question of the right of the county clerk to assign such a certificate under the old revenue statutes, after the expiration of three years from its date, is no longer an open one in this state.

In *Carnahan v. Sieber Cattle Co.*, 34 Colo. 257, the lower court held two tax deeds invalid, in the first of which it appeared that the county clerk had assigned the certificate after the expiration of three years from its date, and this court said:

"As to the deed first offered in evidence, based upon the certificate of purchase assigned by the county clerk, there can be no doubt that the trial court was right in rejecting the offer. In *Lovelace v. Tabor M. & M. Co.*, 29 Colo. 62, it was expressly ruled that a county clerk has no authority to assign such a certificate except within the specified time of three years prescribed by section 3888," (3 Mills' Ann. Stat. (1st Ed.) Sess. Laws 1894, pp. 46, 47, § 5.)

The appellants contend that the certificate of purchase upon which the tax deed under consideration was issued was not assigned by the county clerk, but by the board of county commissioners. They assert that the board of county commissioners under its general power to make such orders concerning the property of the county as it may deem expedient, can assign a tax certificate at any time and authorize the county clerk to make the assignment. This point need not be determined, and no intimation either way is made about it,

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for the reason that it appears from the tax deed that the county clerk made the assignment, not for the county commissioners, but under the statute authorizing him to make such an assignment within three years from the date of the certificate. The recitals in the tax deed, immediately following the recital that the certificate had been issued to the county, are as follows:

"and whereas W. A. Turner of the County of Logan and State of Colorado did on the 27th day of April, A. D. 1901, pay to and deposit with the treasurer of said county the sum of forty-seven and 66-100 dollars in accordance with the judgment, decision and order of The Board of County Commissioners of the County of Logan, heretofore in due time, form and manner duly had and made by said Board at a regular meeting of said Board held at the county-seat of said County on the 4th day of April, A. D. 1901, at which said meeting said Board did decide that said certificate of purchase to said land might be sold, assigned and delivered by the Clerk of said County to such person, at and for the sum of forty-seven and 66-100 dollars, said amount including the taxes assessed and due on said property since the date of the sale thereof to said County; and, whereas, in consideration of the premises and in accordance with the provisions of said section 5 of the Session Laws of the State of Colorado, approved March 3d, 1894, and the laws of Colorado in such case made and provided, the clerk of the County of Logan did, on the 27th day of April, A. D. 1901, duly sell, assign and deliver unto him, the said W. A. Turner the said certificate of purchase to the property aforesaid, and all right, title and interest which the County of Logan had in and to the said certificate and to the property therein described."

It appears from these recitals that what the board of county commissioners did was to decide that the county clerk might assign the certificate for a certain

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amount, but there was no direction to the county clerk to do so in the name of the board. The tax deed shows that the county clerk did not make the assignment by virtue of any authority or direction given him by the county commissioners, or for them, or in their name, but does show that he made the assignment in accordance with the provisions of Section 5 of the Session Laws of 1894. Section 5 in the Session Laws of 1894, relating to the assignment of such certificates is found on pages 46 and 47 of the Session Laws and relates to the assignment of the certificate by the county clerk, independent of the commissioners, within three years from the date of the certificate. It is plain from the deed that the clerk did not assume to act for the board in making the assignment, as its agent or attorney in fact under authority from it, but did assume to make the assignment in his capacity as county clerk, under the authority assumed to have been conferred upon him as such clerk by section 5 of the act of 1894 and the laws of the state. He deferred only to the commissioners, as to the amount for which he would make the assignment.

The action of the District Court in holding the tax deed invalid and rejecting it as evidence was right, and the judgment is, therefore, affirmed.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GARRIGUES concur.

[No. 6512.]

GARDNER V. CHERRY.

1. TAX TITLE—*Advertisement of Sale—Proof of Publication*—An affidavit of the publication of the notice of a tax sale of lands, showing no more than that copies of the paper were deliv-

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ered by mail or by carrier to all regular subscribers in the country, is defective—(152).

2. ——*Supplemental Affidavit*—Where the affidavit of publication is defective, a supplemental affidavit supplying its defects, though made and filed only the day before the trial of an action in which the tax sale is contested, is admissible and to reject it is error—(154).

And where such supplemental affidavit is afterwards contradicted by affidavit of the same person who made it, the court should receive evidence, and determine which affidavit speaks the truth—(155, 156).

The supplemental affidavit, secured and filed on the eve of the trial, is not a public record, and so above contradiction and impeachment by the same affiant, within the doctrine of *Sternberger v. Moffat*, 44 Colo. 520—(156).

Appeal from Denver District Court—HON. HUBERT L. SHATTUCK, Judge.

Mr. EDMUND J. CHURCHILL attorney for appellant.

Mr. JOHN H. DENISON attorney for appellees.

Mr. JUSTICE HILL delivered the opinion of the court.

This is an action to quiet title. Complaint is in the usual form. The answer denies the allegations of the complaint and alleges the defendant is the owner by virtue of a certain tax deed, etc. The validity of the tax deed was brought into question by replication. Judgment was in favor of the plaintiffs, from which this appeal is prosecuted.

At the trial (which was held January 16, 1908), the plaintiffs deraigned a good title by certain evidence and admissions; thereupon the defendant offered in evidence a tax deed to the property, dated December 14, 1904, and recorded upon the same date, also tax receipts showing taxes paid by him for the subsequent years of 1904, 5 and 6. The defendant then offered as

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evidence its Exhibit 5, which was a purported certified copy of an affidavit of publication of the tax sale, under which the deed was issued. At the time this offer was made defendant's counsel stated, in substance, that the affidavit was only made the day before, but that they would argue that at the proper time. The plaintiffs objected to the admission of this affidavit, and, among other things, their counsel stated:

"And I wish to say that if any evidence should come up that will discredit this Exhibit 5, I shall reserve the right to ask for a new trial, as the said affidavit filed yesterday is a complete surprise to me and to the plaintiff. * * * I have made some effort to find out the facts in reference to this affidavit of yesterday, but I have not been able to learn anything definite, and I cannot make a statement that I can produce any evidence on that subject, but I have information which leads me to believe that I can obtain some."

Previous to the court's ruling on the admission of this affidavit, two other affidavits pertaining to the publication of this tax sale list were admitted in evidence. The first was dated and sworn to on November 7, 1901; evidently this was the first one, and filed in an attempt to comply with the provisions of the statutes as to proof of this publication. The second was dated and sworn to November 21, 1901; it was evidently intended as an addition and supplement to the original, and appears to set forth facts not contained in the former. Pertaining to the dates of publication, both were defective in only stating that copies of the paper were delivered by mail or transmitted by carrier to all regular subscribers in the county.

The trial court refused to admit in evidence the affidavit, Exhibit No. 5, which appears to have been secured from the business manager of the paper the day before the trial, for the purposes of this case. It is conceded that the first two affidavits are totally de-

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fective and are not sufficient to show a substantial compliance with the statute. In rejecting the third affidavit, the court stated,

"It seems to me, gentlemen, that this publisher's affidavit, Exhibit No. 5, under the circumstances of this cause, ought not to be received in evidence. It being admitted, then, that the other certificates are not sufficient in form, I suppose it is not necessary for me to decide anything further."

The third affidavit, evidently secured by the defendant, is sufficient in form, and it is contended under the ruling of this court in the case of *Sternberger v. Moffat*, 44 Colo. 520, that this question has been determined; that the affidavit was admissible and that the trial court erred in rejecting it.

The record further discloses that, six days after the trial, the plaintiffs filed in the case a motion to open up the decree, which was in their favor, and to permit them to introduce in evidence a certified copy of another affidavit of the business manager of this same paper (who had made the previous affidavits), in which last affidavit he states that the facts set forth in the first two affidavits were correct, and that this affidavit is made to correct the certificate and affidavit signed by him on January 15, 1908 (Exhibit 5). He further states that the statement in the affidavit of January 15th, that copies of each number of said paper in which said notice and list were published, were delivered by carriers or transmitted by mail to each of the subscribers of said paper, according to the custom mode of business in said office, was not true; but whereas, in truth said notice and list were delivered with the said paper to the subscribers within the County of Arapahoe, but not to the subscribers of said paper without said county, and that the above quoted statement in his verified certificate filed January 15, 1908, was a mistake, oversight and inadvertence. The plain-

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tiffs, as a further reason to sustain their motion to open up the decree and allow this evidence to be introduced, filed with the motion an affidavit of their counsel; he states that at the trial the plaintiffs were surprised by the introduction of the affidavit of January 15th; that neither plaintiffs nor counsel ever heard of the affidavit (defendant's Exhibit 5) until it was offered in evidence; that said affidavit was, by mistake, false in fact, in this, that the advertisements of tax sales therein mentioned were not circulated outside of the county, and that the same has been corrected by the subsequent affidavit, a copy of which is set forth in the motion to which this affidavit is attached.

In the case of *Sternberger v. Moffat, supra,* it was held, where an affidavit of the publisher was defective, and another one in due form, properly verified, was filed with the County Clerk during the progress of the trial, which conforms to the statute, that it was properly admitted in evidence, citing with approval the case of *Bertha Gold M. & M. Co. v. Burr,* 31 Colo. 264.

While it is true, in the case at bar the original affidavit, and the one supplemental thereto, state a partial compliance with the statute, yet they do not state or show that the remainder of its conditions was complied with; they state that the delivery was by mail or carrier to the subscribers of the paper in the county, but do not state how, or that they were delivered to the subscribers of the paper residing out of the county. Under these circumstances, following the cases above cited, we think it was proper for a supplemental or additional affidavit to be filed setting up the truth of these facts; for which reasons, we conclude it was error to reject the affidavit which showed a compliance with the statute, although it was executed and filed the day preceding the trial. This necessitates a reversal of the judgment, but makes unnecessary any ruling upon the cross assignment of error by the plaintiffs (appellees here),

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in the overruling of their motion to open up the decree and allow the introduction of the affidavit of the same business manager of the same paper, who made the former affidavits.

In view of a new trial the existence of all of these affidavits on record becomes material, and it is proper for this court to give an expression concerning them, and their effect when again offered in evidence. When the records are again produced from the County Clerk's office, if the position of this record is correct, they will disclose the existence of these four affidavits pertaining to this publication. The first two, filed soon after the publication, fail to show that the statute was complied with in the delivery of the paper containing the published notice of the tax sale, to all the subscribers of the paper, or the manner of its delivery. The one executed and filed January 15, 1908, will show a delivery in compliance with the statute; another, by the same person, filed four or five days afterwards, will show that the delivery was not made in compliance with the statute, or at all, to subscribers of the paper residing outside of the county; in other words, that the statute was not complied with. It further states that his affidavit of a few days previous was false, in fact, and these false statements were a mistake, oversight and inadvertence upon his part.

In the case of *Bertha Gold M. & M. Co. v. Burr, supra*, it was held that it is the fact of publication and posting, and not proof thereof, that gives the treasurer jurisdiction to make a tax sale and execute a tax deed, and under this state of the record where the first two affidavits fail to state a compliance with the law, the third does, and the fourth states the third is false, and reiterates the truth of the first and second, all executed by the same person, we think it incumbent upon the trial court, when properly presented, to receive evidence concerning, and pass upon the question of fact as

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to which of these affidavits states the truth and be guided accordingly.

Under the circumstances shown this third affidavit is not the kind of a public record, which, as a matter of public policy, the law would not permit to be impeached; and while it is true, as stated by Mr. JUSTICE CAMPBELL in the case of *Sternberger v. Moffat, supra,* "we think a public officer may not thus render nugatory his official acts to the injury of those who have a right to rely upon public records.—20 Am. & Eng. Enc. Law (1st ed.), p. 511." We do not think it is applicable to the case under consideration; eliminating the question of whether the acts of a publisher are such as a public officer, the record discloses that this affidavit, which its maker says is false in fact, had not been made a public record in an attempt to comply with the provisions of the statute at the time it is presumed it would be done. The first two affidavits were evidently intended for that purpose, and to any one who relied upon these documents, they fail to state that the law was so complied with. This third one was evidently secured by the defendant and filed with the County Clerk the day preceding the trial, for the purpose of sustaining the validity of this tax deed, and if, under these circumstances, it fails to state the truth, it would be an anomalous position for a court to hold that it could not be impeached; otherwise, the result would be to say that if, by some means, a party to a suit (concerning the validity of a tax deed), the day preceding the trial, secured an affidavit, false in fact, it could not be held subject to impeachment for the reason that it was made by the publisher and filed as a public record.

Had an attempt been made to attack the truth of the statements in the original affidavit of the publisher, filed in compliance with the statutes, within a reasonable time after the publication of the tax sale,

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upon which the public had the right to rely at the sale and subsequent, that would present an entirely different question and no expression of opinion is here intended upon a case of that kind or any other involving any public document; these views are expressly limited to the facts under consideration where it is sought to be shown that the affidavit was secured the day preceding the trial, then filed with the County Clerk, and a certified copy introduced in evidence the next day, when its maker, a few days thereafter, states in another affidavit, evidently advisedly, that the other is false in fact and was made through oversight, inadvertence and mistake, all of which are now on file and refer to this tax sale. Under these circumstances it would be a queer rule indeed to hold that the veracity of the statement of facts contained in this affidavit could not be inquired into and the real truth of the matter ascertained.

Other irregularities are urged which it is alleged make the tax deed invalid, but inasmuch as the ruling pertaining to the sundry affidavits concernng the publication of the tax sale list compels a reversal of the judgment, and if the facts are as counsel claim they are, and the way the record as a whole appears to indicate, it makes unnecessary the consideration of any of the other questions urged.

For the reasons stated the judgment is reversed and the cause remanded for a new trial in harmony with the views herein expressed. *Reversed.*

Mr. JUSTICE GABBERT and Mr. JUSTICE MUSSER concur.

[No. 6523.]

COWAN V. HOWARD.

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APPEALS—*Findings of Fact Conclusive*—The general rule well established, is, that upon review, the findings of the trial court will not be disturbed—(158).

The evidence examined and the case held within the rule, and not within any exception to it—(159).

Error to Denver District Court—HON. GEORGE W. ALLEN, Judge.

Messrs. RICHARDSON & HAWKINS and Mr. STEPHEN W. RYAN for plaintiff in error.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court:

The plaintiff Cowan brought suit against defendants to recover $500, which he claimed to be due him on contract. Trial in the district court without a jury resulted in a verdict for defendants. On this review no legal questions are raised, only issues of fact are involved. The plaintiff says in his complaint, and in his testimony, that defendants agreed to pay him $500 if he would cancel, and release them from the obligations of, an exclusive written option for the sale of their lands, which he held, and which ran ninety days, and that, relying upon such promise, he cancelled the option. Upon the material fact as to the promise there was testimony by defendant David Howard in behalf of defendants. For plaintiff, he himself and Mr. Alexander, who was interested, testified. That for plaintiff was squarely contradicted by that for defendants. The testimony of Mary Howard, which bore more or less directly upon the principal issue, was also given and it tended to support her co-defendant. Such being the case, the well-established general rule in this jurisdiction is that, upon a review, the findings of fact of the trial court will not be disturbed.

Plaintiff's counsel, however, seek to bring this case within its claimed exceptions; that the preponderance of evidence was clearly in plaintiff's favor and that the

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court misconceived its legal effect. The argument is that since there were but three witnesses, the plaintiff, the defendant David Howard, both of whom were interested, and Alexander, a disinterested witness, and since the court considered them equally credible, the peponderance is to be determined by the number of witnesses, and that as the testimony of two of the three tended to establish plaintiff's claim, the finding should have been in his favor. There are several answers to this contention. Alexander was not a disinterested witness. He himself, as well as the plaintiff, says that he was equally interested with plaintiff in the judgment the latter might obtain. The trial court did not conclude that these witnesses were equally credible. In the oral opinion and findings which are incorporated in the record, the trial court did say that the preponderance of evidence was not with plaintiff, but the learned judge did not say, even by inference, that he believed that each of these three witnesses told the truth, or that each of them was worthy of full belief. The court was justified, if he believed the testimony of defendants to be true, in making a finding in their favor. In addition to the oral testimony there were circumstances in evidence tending to corroborate defendants and to discredit plaintiff. The trial court was better able to judge of the credibility of witnesses than we are, and as there is nothing in this case as made by the evidence to bring it within any of the recognized exceptions thereto, we must enforce the general rule announced. With respect to defendant David Howard there is no warrant whatever in the evidence tending to show that he was holden to plaintiff. The lands belonged to Mary Howard. She alone, and not her husband, David, signed the written option, and there is no evidence that David consented to be bound by the written option, or that there was any consideration for his alleged promise to pay the $500. If David was authorized by

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Mary, as to which the evidence is not clear, to make an agreement for the payment of money in consideration of the cancellation of the option, the trial court found, and there is legal, competent, and sufficient evidence to sustain the finding, that David did not make any such promise either for Mary or for himself.

The judgment is therefore affirmed.

Affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE HILL concur.

[No. 6530.]

MICHIGAN STOVE COMPANY V. PUEBLO HARDWARE COMPANY.

1. CONTRACTS—*Mutual Assent*—Mutual assent is established by an offer of one party, and acceptance by the other; and assent by one party to the offer of the other may consist in words alone, or in both words and acts—(163).

Where one party performs the act which the offer of the other contemplates, this is effectual as an acceptance of the offer—(163).

2. COUNTERCLAIM—*For a Tort*—The negligent failure to perform a contract affords an action on the contract, and may found a counterclaim in an action brought upon a different contract—(163, 164).

3. ——*Unliquidated Claim*—A claim is not to be rejected as a counterclaim merely because it is unliquidated—(164).

The provisions of the code have for their purpose the avoidance of circuity and multiplicity of actions, and should be liberally construed—(164).

4. PARTNERSHIP—*Two, of the Same Partners*, constitute in law a single partnership. Either may maintain an action upon a contract made with the other, without an assignment—(164).

5. BAILEE—*for Hire*—Plaintiff, a merchant in Chicago, in consideration that defendant, a merchant of Colorado, should purchase of him certain goods, and pay an additional consideration, agreed with the latter that he would receive, and care for other goods, purchased by the defendant, from another dealer, and load them in the same car in which the goods purchased

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of plaintiff should be loaded. *Held*, that plaintiff was a bailee for hire and bound to ordinary diligence—(165).

6. NEGLIGENCE—*Ordinary Care*, is that degree of care which an ordinarily prudent person would exercise under similar circumstances—(165).

The evidence examined and held to disclose a want of ordinary care on the part of plaintiff, in performing its duty as bailee —(165, 166).

Error to Pueblo District Court—HON. J. E. RIZER, Judge.

Messrs. HARTMAN & BALLREICH and Mr. CHAS. L. AVERY plaintiff in error.

Messrs. ADAMS & GAST for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court.

Plaintiff in error brought suit against the defendant in error on an account, in the sum of $422.33 and interest, for goods, wares and merchandise sold the latter. The defendant answered, admitting the indebtedness sued upon, and by way of defense, and as a counter-claim, alleged that plaintiff was indebted to it in the sum of $255.70, which plaintiff owed the Holmes Hardware Company, which indebtedness the latter had assigned to it. In conjunction with the answer, the defendant offered to allow judgment to be taken against it for the difference between the two accounts. The plaintiff filed a replication to the averments of the answer, upon which the counter-claim was based, and subsequently the case was tried and submitted to a jury on the counter-claim, with the result that the counter-claim was allowed, and judgment rendered in favor of plaintiff for the difference between the two accounts. Plaintiff brings the case here for review on error.

It is claimed that the counter-claim should not have been allowed for the following reasons: (1) It

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was based upon an alleged contract between the plaintiff and the Holmes Hardware Company, which the evidence failed to establish; (2) that it was based upon an alleged tort; (3) that the assignment of the counterclaim was without consideration; and (4) that it represented an unliquidated claim. We shall consider these several propositions in the order named.

In the answer it is alleged that the plaintiff promised and agreed with the Holmes Hardware Company, for and in consideration of the purchase from plaintiff of certain goods, wares and merchandise, and for the further consideration of eleven dollars, to receive, care for, and load upon a car in the City of Chicago, in which the merchandise purchased from plaintiff was to be loaded, certain articles of merchandise which the Holmes Hardware Company had purchased from other hardware dealers in that city; that these articles were received by the plaintiff in good condition, but that it so negligently stacked and placed them that they were exposed to storms and rains, whereby they were greatly damaged. It is claimed that the testimony does not establish the contract thus pleaded. We think it does. It appears that the Holmes Hardware Company and the Pueblo Hardware Company are owned and controlled by the same individuals, but under different partnership names; that the business of the partnership is conducted at two places in the City of Pueblo, one under the name of The Pueblo Hardware Company and the other under the name of The Holmes Hardware Company; that Mr. Holmes is the manager of both places, and that he ordered goods of plaintiff from one of its traveling salesmen, for the Pueblo Hardware Company, with the express understanding that as part consideration for such order, the plaintiff would receive and load in the car in which the articles purchased from it were loaded, the merchandise described in the answer setting up the counter-claim,

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which the Holmes Hardware Company had purchased, or would purchase, from other dealers in the City of Chicago. The plaintiff accepted the condition upon which the order for The Pueblo Hardware Company was given by filling it. It also appears from the testimony that it is the custom, in the hardware trade, for jobbers in wholesale centers like Chicago, when a purchase is made from one, to load goods purchased from other dealers in the same place, in order to give the customer the benefit of car-load freight rates. The plaintiff loaded the articles in question in the car in which the goods ordered from it were loaded and shipped. In addition it appears the Holmes Hardware Company promised and agreed to pay the plaintiff for those services, at the time the request to render them was made, and thereafter paid it the sum of eleven dollars, its charges, as per a bill rendered for expenses incurred in loading these articles. Perhaps the testimony does not disclose an express agreement on the part of the plaintiff to perform these services, but it appears that the Holmes Hardware Company proposed to enter into a contract with plaintiff to receive, care for, and load the articles in question, upon the terms and conditions and for the consideration pleaded, which the plaintiff accepted by performance. This establishes mutual assent—the essential of a contract—by an offer and acceptance, which may consist of words alone, or of both words and act.

It is contended that the counter-claim is founded upon tort, for the reason that it is based upon the alleged negligence of the plaintiff. True, negligence is charged, but the liability of the plaintiff for the negligence pleaded and proved, grows out of a breach of its contract. A counter-claim may be based upon a breach

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of contract, although such breach may also be a tort. 25 Ency. 584.

During the progress of the trial, it developed that the assignment of the claim of the Holmes Hardware Company against the plaintiff to the defendant was for the purpose of collection. Counsel for plaintiff in error therefore insist that the defendant was not the real owner of the claim, and that an assignment of a claim pleaded as a counter-claim will not be recognized unless the party pleading it unconditionally and absolutely owns it. We are relieved from determining this important question. It appears, as above stated, that the personnel of the two firms is identical, and that these individuals conduct the hardware business at separate places under different partnership names. When the same persons carry on the same business as partners in different places, but under different names, there is, in law, but a single partnership. *Campbell v. Colo. C. & I. Co.*, 9 Colo. 60. The assignment of the claim of the Holmes Hardware Company to the defendant was, therefore, unnecessary, for the reason that this claim, in law, belonged to the same partnership and the same parties.

In some jurisdictions it is probably the rule that unliquidated claims can not be the subject of counter-claim. What the rule should be must depend upon the construction of the provision of the Civil Code, allowing counter-claims to be set up as a defense. The object of this provision in our code is to enable parties to settle and adjust their cross-claims in a single action, and thus avoid circuity and multiplicity of suits. To this end it should be liberally construed. Our Civil Code, § 57, in designating what constitutes a counter-claim, reads: "Second; in an action arising on contract, any other cause of action arising, also, upon contract."

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A claim based upon a cause of action arising upon contract is often unliquidated in the sense that the amount of the claim is not settled or adjusted. To hold that such a claim must be liquidated to render it available as a counter-claim would not only result in preventing counter-claims from being pleaded, in many instances, but would rob the code of its beneficent purpose by reading into it a qualification or limitation which is not found there, and does not impliedly belong there.

It is next urged that the counter-claim should not have been allowed because the evidence does not establish that plaintiff was guilty of such negligence or want of care in handling the goods of The Holmes Hardware Company as would render it responsible. This contention is based upon the assumption that plaintiff was a gratuitous bailee, and therefore, only required to exercise slight care or diligence. The promise is not justified from the record. We think the testimony unquestionably establishes that plaintiff was a bailee for hire, and that there was a valuable consideration for the services it undertook to perform. These services were also for the benefit of the Holmes Hardware Company, so that the case falls within the rule, that when a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect.—*Story on Bailments*, § 23; *Dart v. Lowe*, 5 Ind. 131.

Ordinary care is that degree of care which an ordinarily prudent person would exercise under similar circumstances. Whether or not the plaintiff exercised this degree of care was submitted to the jury, and from the verdict returned, determined against it. The only question, then, is whether the testimony is sufficient to sustain that finding. We think it is. The goods were delivered by the firm from whom purchased upon the platform, from which they would be loaded into the car. The employes of plaintiff knew when these goods

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were delivered, and of what they consisted. They were there at the time. The platform was without a roof. Plaintiff admits that it received the goods in good condition. Before they were loaded into the car it rained, and this was the cause of the damage. The bulk of the damage consisted in injury to bundles of planished iron, which were badly rusted. This kind of iron is easily injured by water, and was, therefore, packed so that when placed "right side up," the bundles are impervious to rain. The bundles containing this iron were marked on the water-proof side "Keep dry. This side up." On the opposite side they were marked: "The other side up. Keep dry." If these directions had been followed, injury to the iron could have been avoided. The goods of the plaintiff on the platform at the same time were not injured by the rain; so that it seems, from all the facts and circumstances, there was sufficient evidence from which the jury could well determine that by the exercise of reasonable and ordinary care injury to the goods could have been prevented.

Errors are also assigned on the instructions given and refused, but as they involve the same questions already considered, we do not deem it necessary to notice them in detail.

The judgment of the District Court is affirmed.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and MR. JUSTICE HILL concur.

[No. 6536.]

BROWN EASTES v. WALLEY ET AL.

1. HEIR—*Liability for Debts of Ancestor*—The sole heir of the decendent is appointed administrator upon his estate, and by conveyances and transfers from those in whom the legal

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title is vested, acquires title to, and possession of the whole estate of the decedent, which greatly exceeds in value the liabilities of the deceased. Claims are presented against the estate in due season. The administrator resigns and the claims are not allowed. The heir is liable to the action of the creditor though the administration is not closed—(169, 170).

2. ELECTION OF REMEDIES—It rests with the creditor in such case to proceed in the administration proceedings or by independent action against the heir—(170).

Appeal from Denver District Court—HON. GEORGE W. ALLEN, Judge.

Mr. A. M. STEVENSON for appellant.

Mr. CLINTON REED and Mr. H. WENDELL STEVENS for appellees.

Appellees, plaintiffs below, brought suit against appellant upon eleven different causes of action. The first was for the value of a casket and other goods, labor and care in and about the funeral and burial of one Henry George Brown, deceased, which were sold and performed at the instance of those authorized to bind his estate for such expenses. The remaining causes of action were upon accounts growing out of transactions of Brown during his lifetime, with sundry parties, which accounts had been duly assigned to the plaintiffs. The liability of the defendant for these several accounts was based upon averments in the complaint to the effect that the defendant was the widow of deceased; that she had been appointed administratrix of his estate; that he died intestate; that the defendant duly qualified as administratrix, and filed an inventory of the property of the estate; that thereafter there was transferred to her, by certain parties in whom the title to the real and personal property belonging to the deceased was vested, all the property of the estate, consisting of real estate, cash, and other items of personal property, of the value of seventy-five

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thousand dollars; and that the entire amount of the indebtedness against the estate contracted by Brown did not exceed the sum of fifteen hundred dollars.

It is further alleged that within the proper time all the claims sued upon were duly filed in the county court in which the administration proceedings were pending; that the defendant promised to pay them, but that after she obtained title to the real estate, and possession of the personal property above mentioned, she resigned as administratrix and took and carried away from the State of Colorado all of the personal property of the estate, and wrongfully converted the same to her use; that the claims so filed have not been passed upon nor paid; and that the property so taken by her is beyond the jurisdiction of the court, except the real property, which has been attached and levied upon in this case.

To this complaint the defendant filed a general demurrer, which was overruled. Defendant thereupon elected to stand upon her demurrer, and judgment was rendered against her in favor of the plaintiffs for the aggregate sum of the several causes of action sued upon. From this judgment she has appealed.

MR. JUSTICE GABBERT delivered the opinion of the court.

Counsel for appellant contends that the complaint does not state a cause of action for the following reasons: The claims sued upon should have been established against the estate, and until this was done, the action could not be maintained; that the only forum in which such proceedings could be had in the way of establishing the indebtedness against the estate, was the County Court, in which the administration proceedings were pending; that it does not appear defendant's resignation was accepted, or that she has been discharged; that she cannot be held upon her promise pleaded, be-

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cause it was within the statute of frauds; and that the promise pleaded was made in her representative capacity, and hence, she cannot be held individually responsible for such promise; that the real property could not be attached without permission of the county court in which the administration proceedings were pending; that plaintiffs are not judgment creditors, and therefore, cannot maintain an action to subject the property of the estate to the payment of their claims.

None of these questions need be considered. Eliminating all averments of the complaint bearing on them, it appears the action is against the defendant in her individual capacity, the basis of which is that she has secured possession and control of all the property of the estate of her deceased husband, without discharging the indebtedness against it. So, the only question necessary to determine is, does the complaint, upon this theory, state facts from which it appears that she is personally responsible for the several items of indebtedness sued upon? According to the averments of the complaint, this indebtedness consists of valid and existing claims against the estate, to discharge which the property of the estate should have been applied. The defendant was appointed administratrix of the estate. Thereafter all the property of the estate, real and personal, which appears to have been held in trust by others, was transferred to her; that soon thereafter she resigned, and took and carried away from the state all of the personal property of the estate; that the administration proceedings have not been closed, nor have the claims sued upon been paid or passed upon, though duly filed in the county court, where the administration proceedings were pending; that the value of the estate far exceeded the amount of the indebtedness against it; that deceased left no will; and that defendant is an heir of his estate.

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We think these facts render her personally responsible for the indebtedness set out in the several causes of action. She took the property of the estate as an heir of deceased, subject to the payment of the indebtedness against the estate. An heir into whose possession all the property of an estate has come, in the circumstances narrated in the complaint, can only be excused from the payment of its debts by showing that such property is insufficient for that purpose. *Dowling v. Dowling,* 2 Colo. App. 28; *Green v. Taney,* 16 Colo. 398.

This showing she not only failed to make, but, from the averments of the complaint, which, for the purpose of the demurrer, she conceded to be true, she received all the property of the estate of the value of seventy-five thousand dollars, and that the indebtedness against the estate contracted by her husband did not exceed fifteen hundred dollars.

It is also contended by counsel for appellant that no good reason is shown by any averments in the complaint why plaintiff should not have pursued the remedies provided by the statutes relating to estates, or brought suit upon the bond of the defendant. In the circumstances of this case, the choice of remedies rested with plaintiffs.

The judgment of the District Court is affirmed.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and MR. JUSTICE HILL concur.

[No. 6543.]

DUNKLE v. FRENCH.

1. APPEAL—*Presumptions*—Uncertainties in the record will be resolved in favor of the party successful below; *e. g.*, as to

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whether an averment essential to the jurisdiction of the court below, appearing by interlineation in the complaint, was therein, when it was originally filed—(172).

2. PLEADING—*Construction*—Where a complaint in the county court contains the averment required by the statute that the value or amount involved does not exceed $2,000, it is not to be said that it, upon its face, excludes the jurisdiction of that court, even though the statutory averment as to the amount involved is preceded by an *ad damnum* clause, in $2500—(173).

3. APPEALS—*Harmless Error*—An absolute judgment for money, in an action of claim and delivery, will not be reversed where, upon a proper judgment, the appellant will be chargeable in a larger sum—(174).

Error to Arapahoe District Court—HON. FLOR ASHBAUGH, Judge.

MR. GEO. F. DUNKLEE and MR. GEO. Q. RICHMOND for plaintiff in error.

No appearance for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court.

The plaintiff below, who is defendant in error, began an action in the County Court of Arapahoe County, claiming the delivery to him of certain horses. The allegations of the partly typewritten complaint, that appear with certainty from the record, were substantially that plaintiff was the owner and entitled to the possession of the horses, describing them; that they were of the value of $1,000.00; that the defendant was in possession of the horses and wrongfully detained them from plaintiff; that the plaintiff demanded of the defendant the return of the horses, and that defendant failed and refused to return them, to plaintiff's damage in the sum of $2,500.00. The prayer of the complaint was for the possession of the horses, or their value, $1,000.00, if possession could not be given, and for

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$2,500.00 damages. The record leaves some things in doubt and uncertainty. This is a matter that plaintiff in error could have controlled and corrected, but he appears content to leave it so. Several things in the record show circumstantially that, in the original complaint, there appeared, just before the prayer, an allegation written with a pen, in these words: "The value of the property in controversy, or the amount involved, for which relief is sought, does not exceed the sum of $2,000.00." The best that can be said for plaintiff in error is that it is not certain from the record whether this allegation was or was not in the original complaint, filed in the county court. Two juries have found that the plaintiff was entitled to the possession of the horses. The uncertainty in the record cannot be resolved so as to work a reversal of the judgment, but rather so as to sustain it. It will, therefore, be taken that the allegation was in the original complaint. On this complaint, the action was tried in the county court. Judgment was for plaintiff. The defendant appealed to the district court, and at once filed a motion to dismiss the action on the ground that the court was without jurisdiction, alleging that it appeared on the face of the complaint that the amount sought to be recovered exceeded the jurisdiction of the county court. This motion was sustained, and the action was dismissed. Thereafter, in apt time, and for statutory reasons, the plaintiff, on motion, was relieved of this order. The same was vacated and the action reinstated. Plaintiff was permitted to amend his complaint by striking out the words "Twenty-five hundred dollars" in the *ad damnum* clause, and later on by inserting $700.00. The defendant again moved to dismiss the action for want of jurisdiction, contending that the district court had no power to permit an amendment that would bring the action within the jurisdiction of the county court. The motion was denied. Trial was

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had to a jury, and plaintiff prevailed. The defendant has brought the matter here for review upon a writ of error.

It is not necessary to notice the contention that the district court was without jurisdiction, and could not, by an amendment of the complaint, acquire jurisdiction if the county court had none. As has been seen, the complaint contained the averment that the value of the property in controversy, or the amount involved, for which relief was sought, did not exceed the sum of $2,000.00. This averment, or as said in *Hughes v. Brewer*, 7 Colo. 583, its equivalent, is required by Sec. 1527 Rev. Stat., in order to give the county court jurisdiction. When a complaint contains the jurisdictional averment that the statute requires in order to give jurisdiction, it is certainly plain that the averment was put in for the express purpose of limiting the action to the jurisdiction of the court, and it is safe to say that it would so limit it, at least until the averment is overcome by evidence. This never happened either in the county or district court. The verdict of the jury, in each court, found that the value of the horses and the damages for their detention, combined, were much less than $2,000.00. Though the *ad damnum* clause alleged the amount of his damage to be $2,500.00, it was immediately followed by the jurisdictional averment, specifically limiting the action to the jurisdiction of the county court, as required by statute, which undoubtedly would have the effect of limiting the recovery sought to the jurisdiction of the county court. At most, the complaint was ambiguous on this point. The defendant did not object to this ambiguity in a manner and at a time when it could have been objected to and corrected. It cannot be said that the complaint showed on its face that the action was one exceeding the jurisdiction of the county court when it contained an averment expressly limiting it to that jurisdiction. As the original

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complaint, before the amendment, limited the recovery sought to the jurisdiction of the court, the defendant was not prejudiced by the amendment, which still farther reduced the recovery sought to less than the jurisdiction of the court.

The judgment in this case was, that the plaintiff do have and recover of and from the defendant the sum of $420.61, together with his costs. The defendant complains of this because it is not in the alternative for the return of the property, or its value in case it could not be returned. It appears from the record that the horses were not taken from the defendant on the writ; but that the defendant gave a redelivery bond and retained them. It may be that the court found that the horses, for some reason, were thereafter returned. It must not be understood that we intend to intimate that the judgment in actions for claim and delivery must, in all cases, be in the alternative. In order to agree with the plaintiff in error, as far as possible, and to avoid unnecessary contention, it will be assumed that this judgment was technically wrong. In looking at the verdict upon which the judgment was based, it is discovered that the verdict contains all the elements necessary to the entry of a proper judgment. In it, the jury found the issues in favor of the plaintiff; that, at the time of the commencement of the action, he was entitled to the possession of the horses described in the complaint; that they were of the value of $420.00, and assessed damages for their detention in the sum of $420.61. Under the authority of *Duffy v. Wilson*, 44 Colo. 340, a correct judgment might be enrolled in this court, or a reversal ordered, and the cause remanded with directions to the court below to enter it. If this would be done, the judgment would be for the return of the horses, or, if return could not be made, for the payment of $420.00, their value; and that plaintiff have and recover $420.61 damages, together with costs of

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suit. This is the way the defendant says the judgment should have been entered. In that case, he might have to pay about twice as much as under the present judgment, and, unless he is very insistent that he be required to do so, as the plaintiff is not here complaining about the judgment, it will be, and is affirmed.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GARRIGUES concur.

[No. 6546.]

THE PEOPLE V. FITZGERALD.

1. CRIMINAL LAW—*Writ of Error by the People—Judgment*—An accused person is not to be twice put in jeopardy by the judgment of the Supreme Court, in a writ of error prosecuted by the people, under the statute (Laws 1907 c. 162, Rev. Stat. Sec. 1997). The Supreme Court merely approves or disapproves the ruling complained of—(176).

2. INFORMATION—*Duplicity — Uncertainty* — An information which pursues the language of the statute (Laws 1901 c. 66, Rev. Stat. Sec. 1685) charging the stealing of a bicycle, feloniously purchasing it, and feloniously concealing the same bicycle, knowing it to be stolen, embezzled, &c., is not ambiguous, uncertain, or duplicitous—(177).

The mere statement of the district attorney that the different acts charged constitute one and the same transaction is a sufficient answer to a motion to quash such information—(177).

Error to Denver District Court—HON. GEORGE W. ALLEN, Judge.

Mr. GEORGE W. STIDGER, Mr. JOHN H. CHILES and Mr. H. G. BENSON for plaintiff in error.

No appearance for defendant in error.

Under section 1997 Revised Statutes 1908, "Writs of error * * * lie on behalf of the state * * *

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to review decisions of the trial court in any criminal case upon questions of law arising upon the trial, motions to quash," and in other specified cases. No decision of the Supreme Court, however, can operate to put a defendant in jeopardy a second time for the same offense. It is under this statute the district attorney prosecutes this writ in behalf of the people, that the rule of pleading involved may be settled. The question for consideration is the ruling of the trial court sustaining a motion to quash the information. That pleading was drawn under, and based upon, Sec. 1685 Revised Statutes 1908, which, so far as pertinent here, reads: "Any person who shall steal, take, embezzle, carry or ride away, any bicycle, or any person who shall purchase or receive from any person, or conceal or secrete, knowing the same to be stolen, taken, embezzled, carried or ridden away, any bicycle, shall be deemed guilty of larceny." The information, following closely the language of the statute, in the charging part states that "Simon Fitzgerald, * * * did feloniously steal, take, embezzle, carry and ride away, and did feloniously then and there purchase and receive from some person to the district attorney aforesaid unknown, and did feloniously conceal and secrete the said bicycle, then and there knowing the same to be stolen, taken, embezzled, carried and ridden away."

CHIEF JUSTICE CAMPBELL delivered the opinion of the Court.

The motion to quash was based upon the proposition that the information is "ambiguous, uncertain and duplicitous" in that it fails to inform the defendant for what particular crime he is being prosecuted and that three distinct and inconsistent crimes against defendant are charged in one and the same count of the information. The Court was clearly wrong in sustaining the motion to quash. The statute is in the disjunctive.

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The stealing of a bicycle by a defendant, or the pu chase or receiving from any person, or the concealir or secreting of a bicycle, knowing that the same ha been stolen, all are, and each is, under the statute deemed larceny. An information conjunctively charg ing the same defendant with doing all of these acts at the same time and as a part of the same transaction is not duplicitous. Such is the rule already established in this jurisdiction, and it should have been heeded and applied by the District Court in this cause. We shall not repeat the argument to support it. We refer to, and again approve, *McClure v. People*, 27 Colo. 358. After reviewing and discussing a number of cases bearing upon the point now under consideration, this Court, at page 367 thus summarized its conclusion: "Where two or more acts, stated in the statute disjunctively, either of which is an offense by itself if done by different persons or at different times, when done by the same person and at the same time and relate to the same transaction and are followed by the same penalty, they may be united in one count of an indictment or information, as constituting but one offense." That is exactly this case. Though the fact does not appear upon the face of the inforamtion, under the doctrine announced in *Short et al. v. People*, 27 Colo. 175, the mere statement of the district attorney that the different acts relate to and constitute one and the same transaction is sufficient as against a motion to quash. This information, in form, is like the one before the court in *McClure v. People, supra.* Under the bicycle statute precisely the same penalty is imposed whether the defendant stole the bicycle, or purchased it with the knowledge that it had been stolen, or concealed or secreted it with such knowledge. The ruling of the Court is wrong. Trial courts must be governed by the rule of pleading again approved in this opinion. It follows that judgment on motion to quash the information was

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wrong, and it is therefore disapproved and reversed.

Reversed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

[No. 6568.]

BRUNTON v. DITTO, ADMINISTRATOR.

1. APPEAL—*Verdict on Conflicting Evidence*, will not be reviewed on appeal—(179).

2. APPEAL—*Transcript of Record—Original Documents*—Action upon a promissory note. The defendant prevails upon the ground of an alleged fraudulent alteration. The paper itself is presented at the trial below, and witnesses are examined as to its appearance. If the defendant would have a review of the judgment for the insufficiency of the evidence as to the alleged alteration he must bring up to this court the original paper—(180).

3. INSTRUCTIONS—Where in an action upon a promissory note the defense is fraudulent alteration, instructions which make it plain to the jury that they can find for the defendant only upon a clear satisfactory preponderance of the evidence are sufficient.

The refusal of instructions prayed which announce that the evidence must be "strong," "convincing," "indubitable," and the like, is not error—(180).

Error to Gunnison District Court—HON. SPRIGG SHACKLEFORD, Judge.

Mr. J. M. MCDOUGAL and Mr. WILLIAM JOYNER for plaintiff in error.

Mr. DEXTER T. SAPP for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the Court:

Plaintiff in error seeks to recover, from the estate of John E. Brothers, deceased, the sum of $950.00, together with interest thereon, less $7.50 paid January

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12, 1907, as evidenced by an alleged promissory note of deceased bearing date January 2, 1907. The claim was presented to, and rejected by, the administrator, defendant in error herein. Thereafter, a trial was had in the county court, resulting in judgment in favor of the estate, from which the claimant prosecuted an appeal to the district court, where the case was again tried, resulting in a like judgment. To reverse the judgment, there rendered, the claimant prosecutes this suit.

The defense claimed that the note had been fraudulently altered, after its delivery, so as to read $950.00 instead of $150.00 as originally written.

Neither the claim filed with the county court, nor the alleged note, is embodied in the record, though a copy of the alleged note appears therein.

Plaintiff in error claims that the evidence is wholly insufficient to warrant the verdict, and support the judgment.

A verdict upon conflicting evidence, under proper instructions, and which the trial court has refused to set aside, will not be reviewed in this court. *Gilette v. Young,* 45 Colo. 562. Upon the vital issues in the case, a substantial conflict appears in the evidence. Numerous witnesses testified to facts and circumstances tending to show, and from which the jury could properly conclude, that the note had been fraudulently changed as claimed. One witness testified to a conversation had with the plaintiff in error, long after the alleged execution of the note, and just before the death of the maker thereof, in which plaintiff in error stated that John E. Brothers, the maker of the note, owed her $150.00. Another witness testified to a state of facts showing, or tending to show, that plaintiff in error had in her possession, subsequent to the death of the maker of the note, a bottle of fluid which, when applied, would remove ink from paper. Other witnesses testified, that

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the appearance of the note indicated that certain material parts forming the original amount thereof, had been removed by some such liquid. While still others, as experts, testified to the alteration of the note in the respects claimed, and, in their opinion, the changes had been made after the note was originally written. It is true, two witnesses testified to being present when the note was executed and delivered, and that no change had been made therein, but the apparent change was the result of a poor pen and frozen ink. The jury, as it had the right to do, under the circumstances of this case, evidently disbelieved such witnesses in those respects. Moreover, if we were inclined, which we are not, to pass upon the sufficiency of the evidence to support the verdict, we could not do so, as plaintiff in error has failed to embody in the record the very note upon which her claim is predicated. This essential evidence, and its importance, for the purpose of inspection, is readily apparent. The note was before the jury, and they inspected it. It is not before us, and the failure in that respect is through the negligence of plaintiff in error.

Certain instructions requested were refused, and error is assigned thereon. The only difference between the instructions refused and those given, is, that in the former the words "clear," "strong," "convincing," "concise" and "indubitable" are used, as descriptive of the character of evidence essential to establish the fact, that the note in question had been fraudulently altered, whereas, in the instruction given no descriptive words in that respect are found. We think the instructions given made it clear to the jury that they could arrive at a verdict for defendant, only from a clear, satisfactory preponderance of the evidence upon the issues involved, and that such evidence must be sufficient to convince the mind of a reasonably prudent and cautious person. This we think was sufficient, and the instruc-

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tions requested and refused, were substantially covered by those given. It devolves upon plaintiff in error to show wherein the judgment is wrong, and having failed therein, it is affirmed. *Judgment affirmed.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE BAILEY concur.

[No. 6677.]

THE COLORADO AND SOUTHERN RAILWAY COMPANY v. KING ET AL.

1. CONSTITUTIONAL LAW—*Judgment Grounded on Void Statutes*—A judgment grounded solely upon a statute which this court has declared to be unconstitutional will be reversed.

Appeal from Larimer District Court—HON. JAMES E. GARRIGUES, Judge.

Mr. E. E. WHITTED and Mr. ROBERT H. WIDDICOMBE for appellant.

Messrs. TRINDLE & SIMPSON for appellees.

Mr. JUSTICE BAILEY delivered the opinion of the Court.

The action was by plaintiffs, appellees here, to recover from the defendant, appellant here, damages in the sum of $1,200.00, for negligently, with its engine and cars, running upon, over and against, and thus killing some, and maiming others, of a number of horses and mules described in the complaint, the property of plaintiffs. Two causes of action are stated. One, based upon the statute requiring railway companies to erect and maintain fences and gates along their tracks and rights of way, passed in 1902 at the extra session of the thirteenth General Assembly. The other upon the

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common law, which makes a railway company liable for the killing of stock, through the negligent or careless operation of its trains. Trial was to the court, with findings for plaintiffs, and judgment thereon for $1,185.00. The defendant brings the case here on appeal to review that judgment.

The court below found specifically that there was no proof at all of common law negligence, and that there could be no recovery in the case on the cause of action thus laid. No complaint is made of this finding and no cross-errors are assigned.

The findings and judgment in favor of plaintiffs were and are based solely upon the failure of the defendant company to fence its tracks and right of way and maintain such fencing, as required by the legislative act already herein referred to. That act has by this court been declared unconstitutional, in the case of *The Denver and Rio Grande Railroad Company v. Moss*, decided at the January, 1911, term, and therefore no recovery under it can be upheld.

Since at the trial, as found by the court, no evidence was introduced to establish common law negligence, it must be assumed that there is none, or if there be, it is clear that the plaintiffs have waived their right to be heard upon it, because of failure to offer the same according to the opportunity already afforded.

The judgment is reversed and the cause is remanded to the District Court, with directions to dismiss it. *Judgment reversed.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE WHITE concur.

[No. 6678.]

PEOPLE v. HEATH.

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1. CRIMINAL LAW—*Arraignment—Plea*—Where the accused is tried and convicted without ararignment or plea, the judgment must be arrested—(183).

The provision of the statute (Mills' Stat. Sec. 1433, Rev. Stat. Sec. 1956) that no judgment shall be arrested "for any matter not affecting the real merits of the offense charged," has reference to the information, not to proceedings during the progress of the trial—(184).

2. ——*Arrest of Judgment—Effect*—Where a judgment upon a criminal information is arrested for want of a plea by the defendant, he may be afterwards arraigned and required to plead —(185).

Error to Denver District Court—HON. HARRY C. RIDDLE, Judge.

Mr. GEORGE STIDGER, district attorney, Mr. JOHN HORNE CHILES and Mr. HARRY S. SILVERSTEIN for the people.

No appearance for defendant in error.

CHIEF JUSTICE CAMPBELL delivered the opinion of the Court:

The District Attorney prosecutes this writ of error to review a decision of the trial court sustaining defendant's motion in arrest of judgment. The trial court thereafter set aside the verdict and granted a new trial. Authority for a review of the motion in arrest is found in section 1997 Revised Statutes 1908. The record does not show that defendant was ever arraigned by the district court or that he ever plead or was required to plead to the information. In *Ray v. People*, 6 Colo. 231, decided in 1882, this Court held, in a writ of error to a judgment on a verdict of guilty, that where defendant was not arraigned and did not plead, a reversal must be had. In *Wright v. People*, 22 Colo. 143, decided in 1896, the Ray case was followed and the doctrine again announced. The district attorney says that in neither case was section 1956 Rev. Stats. 1908 called

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to the attention of, or considered by, the court, though the statute was then in force, and that section 1986, which was not passed until the year 1907, was, of course, not then considered. His contention is that each of them has the effect to cure the absence of such arraignment and plea, and to require at the hands of this court that a different rule be now established. While there is no statement in the opinion in the Ray case that section 1956 was cited, the court evidently was aware of it, since the statute was taken from the State of Illinois, and was in force when the Illinois decisions, which were followed in the Ray case, were announced. Besides, we do not think there is anything in this section which affects the question before us. It provides, among other things, that "no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in such indictment." The merits of the offense as charged in the indictment, and not proceedings during the progress of the trial, are referred to. The part of section 1986 which is supposed to be pertinent, reads: "And no indictment or information shall be deemed insufficient, nor shall the trial, judgment or other proceedings thereon be reversed or affected by any defect which does not tend to prejudice the substantial rights of the defendant on the merits." The defect for which a reversal should not be had seems to refer to a defect in the indictment or information and not to errors committed by the court in its rulings during the trial.

In the Wright case Chief Justice Hayt said in the opinion, that after the decision in the Ray case our General Assembly refused to pass a law to change the statute so as to do away with the necessity for the record to show affirmatively a formal arraignment and plea. If our General Assembly in 1907 had intended, by section 1986, to change the rule of these two

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cases, it would have unquestionably expressed its intent in such a way as to leave the matter in no doubt. These sections relied upon by the District Attorney do not have the legal effect claimed. The doctrine of the two cases has so long been in force in this state that before a different one is announced by the courts a statute should confer the authority. A new trial having been granted to the defendant herein, notwithstanding the ruling of the trial court upon the question we are now considering he may yet be arraigned and required to plead, and can be put upon trial. The ruling here reviewed was right.

Mr. JUSTICE WHITE and Mr. JUSTICE BAILEY concur.

[No. 7026.]

LEARY ET AL. v. JONES.

1. MANDAMUS—*To Judges of Election*—In the interpretation of the ballot by what appears upon its face, the actual count thereof, and the determination of the result, the judges of an election act judicially, and proceeding in good faith, are not controlled by mandamus—(198).

But their duty to count the ballots, and afterward make return of the result is entirely ministerial, and mandamus will lie to compel its performance—(193).

2. ——*Answer*—Where upon mandamus against two of the judges of an election, to compel them to certify to the result, the answer by its silence admitted the counting of the ballots by the three judges, and that if the result, as so ascertained, had been certified, it would have shown the election of the petitioner, an averment that only a certain number of votes were cast, and that upon opening the ballot box after the close of the election a much greater number of ballots was found therein, in the exact similitude of the official ballot, was held to present no defense—(200).

3. ——*Adjournment of the Board—Effect*—The adjournment of the judges, and their separation, is no answer to a mandamus

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to compel them to return the result of their count of the ballots; they may be compelled to re-assemble—(199).

4. ——*Judgment*—Where the pleadings show that, complying with the law, only a certain return can be made, it is proper to command the judges to sign and certify such return—(200).

5. ——*Parties*—A defect of parties which is injurious only to the petitioner does not avail the respondent—(200).

6. APPEAL—*Questions Not Presented Below*—The court will not entertain questions which were waived or not presented in the court below—(201).

Error to Denver District Court—HON. HUBERT L. SHATTUCK, Judge.

Mr. CHARLES S. THOMAS and Mr. THEODORE H. THOMAS for plaintiffs in error.

Miss GAIL LAUGHLIN for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the Court:

It appears from the pleadings, that the plaintiffs in error (who were the respondents in the court below) with one Moran, constituted the judges of election in precinct No. 3 for the school election held in the City and County of Denver on the 3rd day of May, 1909; that, after the closing of the polls, all the judges of election from the thirty-one precincts (which constitute said school district), including the respondents, and Moran, immediately repaired to one of the voting places, to-wit, the East Denver High School, and then and there proceeded to count the ballots cast in their respective precincts. It is alleged, and not denied, that the judges for all of the other precincts, immediately after having counted the ballots in their respective precincts, reported their results to the secretary of the school board, who entered such returns upon a tally-sheet, to which all the other judges affixed their respective signatures; but that the respondents, after the

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count of the ballots found in the box in precinct No. 3, refused to make a report of the result of said count to the secretary of the board, or at all; that Moran did report in writing to the secretary, the result of said count, which report the respondents refused to sign and have ever since so refused to do; that the Board of Directors refused to accept the report from precinct No. 3 signed by Moran, as a proper return, and have denied to the relator (defendant in error here) the right to participate in the deliberations of said board, after proper and lawful demand was made therefor, etc. Upon account thereof she instituted mandamus proceedings against the respondents, to compel them to certify the result of the count in their precinct, alleging, in addition to the foregoing, that the result of the count of said respondents and Moran, for said precinct, was a certain number for each of three candidates, naming them, and giving the number for each, followed with the total vote of the district, which, when this precinct was included, showed that the relator had been elected, and that if the result of said election in said precinct was so certified, the total would then show that she was elected as a member of the directors of said board, entitled to qualify, etc.

A demurrer was sustained to the answer; the respondents elected to stand by their answer; judgment was in favor of the relator, making the alternative writ peremptory, commanding the respondents, within five days, to sign the returns from precinct No. 3 of the vote cast in said precinct at the election held on the 3rd day of May, 1909, theretofore signed by said Moran. The respondents bring the case here for review upon error.

The answer, including its admissions, and by its failure to deny certain allegations of the relator, sets forth only two defenses. In substance, the first and principal defense is, that while it is true the respond-

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ents and Moran acted as said judges of election, that three hundred sixty-five persons, and no more, cast ballots in said precinct and deposited the same in the ballot box prepared, and used for that purpose at said election; that their names were duly recorded upon the poll book or voters' list kept by the clerks of said election precinct; that immediately after the polls were closed, all three judges went to the East Denver High School for the purpose of counting and canvassing the ballots; that, when they opened the ballot box, they found therein one thousand one hundred sixty-three ballots, each of which was in exact similitude of the official ballot voted at the several precincts, or seven hundred ninety-eight excess papers or ballots. By failing to deny, they admit the allegation that the ballots disclosed upon their faces the result as set forth by the relator, but they allege that on account of the above facts they were unable to ascertain or determine which of said papers were ballots cast by the three hundred sixty-five voters who voted in said precinct at said election, and which were not such ballots, for which reasons they allege they made a return to the board containing the above statement, including the fact that they were unable to determine what ballots were good, and what ones fraudulent, and therefore made return that no valid election was held in said precinct, and that they ought not to be required to furnish a false and fraudulent report and return. As a part of this defense, they set forth the further facts, that, eliminating this precinct, another candidate, other than the relator, had received the highest number of votes for such office and that there being no election in this precinct, on account of such frauds, the other candidate, naming him, and not this relator, was elected to said office and entitled to the seat.

The second defense is that inasmuch as the respondents have fulfilled their mission, made their re-

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port to the board of school directors, surrendered the ballot box and poll list, and departed their several ways, their offices as judges of the school election absolutely ceased, and that since said time they have not been, nor are they now, judges of the school election.

The first question necessary to consider is the duties of judges of election. It is claimed by the relator that they are purely ministerial, and if performance is refused it may be compelled by mandamus. In support of this position we are referred to Vol. 15 Cyclopedia of Law and Procedure, page 379, wherein it is stated:

"Inspectors and judges of election are ministerial officers, and where they neglect or refuse to make a return or make an erroneous or improper one they may be compelled by mandamus to perform their duty."

Also, to McCrary on Elections, 4th Ed., Sec. 264, wherein that learned author says,

"The doctrine that canvassing boards and return judges are ministerial officers possessing no discretionary or judicial power is settled in nearly or quite all the States."

Also, to Vol. 26, Cyclopedia of Law and Procedure, p. 278, wherein it is said,

"It is very generally held that certifying or declaring the results of an election is a ministerial duty which may be compelled by mandamus, and this, it has been held, although the refusal to act was on the grounds of fraudulent voting."

Also, to the case of People ex rel. v. Bell et al., 119 N. Y. 185, wherein that court said,

"We cannot hold otherwise as to inspectors of elections than that they are, under the provisions of the election law, made ministerial officers wholly, for their duties are pointed out by the law definintely."

The respondents contend that for the purpose of

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determining the result in the precinct, and certifying the returns, the decision rests solely with the judges of election as to the result of the votes, what is legal and what is not, for whom cast and for whom not, and the right to so certify, and that in the performance of these duties, their acts are judicial and not ministerial, that it requires the exercise of official judgment, the sound discretion of the person in whom the duty is confided, and that in all such cases mandamus will not lie. To support this position they cite *People v. Reardon*, 3 N. Y. S. 560, wherein it is said: "a majority made and signed and filed with the city clerk the result as found by them. This action on their part was judicial in its nature. A writ of *mandamus* does not lie to compel an officer, exercising judicial functions, to make any particular decision, or to set aside a decision already made."

They also cite the case of *People ex rel. Haverly v. Hanes et al.*, 90 N. Y. S. 61, wherein the Court said:

"Inspectors of election have both judicial and ministerial duties to perform. In determining what ballots shall be counted for or against any candidate, or any question voted on, or what ballots shall be rejected, they act judicially. They may, perhaps, be required by mandamus to perform merely ministerial acts in a particular way, and they may also be required to exercise their judicial functions; but they cannot be required by a common-law mandamus to decide in a particular manner. * * * It is the performance of a judicial act on the part of the inspectors which is complained of in this case; not the failure on their part to act judicially, but the judicial conclusion reached by them; and it is this judicial conclusion which it is sought to have changed. The inspectors have performed the judicial act complained of. They may not have reached a correct conclusion, but they have acted and exercised their judgment, and the conclusion reached by them cannot be reviewed herein."

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Also, the case of *Dent v. Board of Commissioners*, 45 W. Va. 750, wherein the court said:

"One canvasser says that it is correct, and satisfies his judgment and conscience; the other says it is not correct, and does not satisfy his judgment and conscience. Shall he be compelled to give an assent under such circumstances? * * * they act judicially in determining that the ballots, poll books, and certificates of the election returns are genuine or altered."

They also cite, as supporting their position, the cases of *Metz v. Maddox*, 189 N. Y. 461; *Cannon v. Board of Canvassers*, 24 R. I. 473; *Corbett v. Naylor*, 25 R. I. 520; *County Judge v. Kenner*, 105 Ky. 517.

From a careful examination of the authorities cited, we are of opinion that all of those referred to, when limited to the particular matters intended to be covered, are, in the main, correct.

Under the provisions of our statutes, judges of election evidently have both judicial and ministerial duties to perform; most of their duties, however, are purely ministerial, in which cases the method of their performance is specifically pointed out and no discretion is to be exercised. Under the facts as disclosed by the pleadings, the duty of certifying to the result of this election was purely ministerial, and the respondents were not justified in refusing.

Considered with the allegations of the relator not denied, the answer, as a whole, shows, that the respondents were two of the judges of election; that they, with Moran as the third, conducted it, and as such, after the polls were closed, went to the proper place to canvass and ascertain the result; that in doing so they ascertained that there was a certain number of ballots in the box proper in form; that they were cast or purported to have been cast for the different candidates, as alleged by the relator. When this condition was

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ascertained, and these facts were disclosed and so found by them as judges of the election, it was their duty to complete the remainder of their work by certifying to the result (which was purely a ministerial duty, clerical in its nature) and they had no right to refuse because of their claim (if true) that there were irregularities, frauds and illegal votes in the ballot box; that was not a question at this stage of the procedure for them to determine, that question should have been left for the courts, as said in the case of *People v. Reardon, supra,* cited by respondents, "when the party who is thereby shown elected shall fill the office, a *quo warranto* is the proper remedy to determine whether he has been duly elected. If upon the hearing it shall be adjudged that the claimant is entitled to the office, a *mandamus,* if necessary, will be allowed to compel his restoration to it." It is not proper for judges of election in one particular precinct to attempt to decide that on account of frauds having been committed no election has been held.

A somewhat similar state of facts is to be found in the case of *The State ex rel. Reynolds, etc., v. The Mayor and Council of Monroe,* 46 La. Ann. 1276, in which case it was held that the promulgation of the returns of election by a mayor and city council is a ministerial duty; obedience to which will be compelled by mandamus. In which case, concerning the question of frauds, the court said:

"If frauds are committed in the election of a character to vitiate the tax, or other causes exist to oppose it, the remedy is not to be sought in any discretion of the council. Instances are not infrequent of taxes of this character being resisted, nor has there been the least difficulty in finding suitable remedies where there is ground for their application, but remedy and relief is not by the refusal of the municipal authorities to perform ministerial acts. There is, in our view, no

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place in this discussion for questions of fraudulent voting, or other defences intimated against the tax itself. Such issues can have no determination to bind anybody to the mere issue whether the result of an election shall be announced by those charged with the duty. Hence, while we have given due attention to all these defences, we are clear they are foreign to the issue here and need no other comment."

We think these comments are applicable to the case at bar. A trial between the relator and these respondents, upon such issues as are attempted to be raised by the answer, can have no determination to bind anybody. The result would not be conclusive in a *quo warranto* or otherwise, to decide who was entitled to the office, and those facts are foreign to the issue here which refers to the performance of a purely ministerial duty.

Counsel for plaintiffs in error have cited numerous well reasoned cases, including some by this court, to the effect that where fraud and irregularity occur in the conduct of an election to such an extent that it is impossible for the contesting tribunal to separate, with reasonable certainty, the legal from the illegal or spurious votes, the precinct wherein the frauds occur should be excluded. We have no contention with this principle, nor with the authorities cited in its support. If the facts exist, pertaining to this precinct, as alleged by the respondents, and no way can be pointed out (as stated by them) whereby the legal votes can be separated from the illegal, and effect be given to the honest votes cast, we can make no suggestion that will aid in the determination of the result of the vote in the precinct, and would probably assume (following former cases) that when the question was properly raised in the proper tribunal, the precinct would have to be rejected in its entirety, but that question is not here for determination; yet, if conditions did exist,

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as alleged, we have not the language at our command to emphasize sufficiently our disapproval of the acts of any citizen, be he great or small, who will participate in, recognize or countenance such practices, including any official, high or low, who, in the performance of his official duty or otherwise, will allow it to be done, when he can prevent it. But this is not the question for determination; to the contrary, the question presented is whether the judges of election, or a majority of them, can raise such an issue as an excuse for their non-compliance with the law in making their official returns.

McCrary on Elections, 4th ed. sec. 264, upon such questions of frauds, says.

"In *Attorney-General v. Barstow, supra,* the supreme court of Wisconsin say that the canvassing officers 'are to add up and certify by calculation the number of votes given for any office; they have no discretion to hear and take proof as to frauds, even if morally certain that monstrous frauds have been perpetrated.' "

We think the case of *State ex rel. v. Stevens,* 23 Kans. 456, relied upon by the respondents, is distinguishable from the case at bar. It pertained to the refusal of the county canvassing board to canvass the returns from the entire county, for the reason that the purported returns disclosed a total vote of two thousand nine hundred and forty-seven, when there were only about eight hundred legal voters in the county. Referring to the election in its entirety, the court said,

"If it be said that this wrong may only have occurred in the returns from certain precincts, and that the others should have been canvassed, we reply that no such question is here presented. The answer presents the matter as a whole, and as though the wrong was universal."

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This election also involved the removal of a county seat, which usually engenders the most bitter fights, and presents the greatest of temptations to commit fraud at any elections. Referring to the other questions, the court, among other things, said:

"Our general knowledge of matters and events assures us that in an outlying and frontier county like Harper, there is no such number of legal voters, and hence that the return of the commissioners that the large majority of such apparent vote is illegal and fraudulent, is substantially correct.

"The question therefore presented is not, whether, when there have been, or is charged to have been, here and there, illegal votes received, or legal votes rejected, or fraudulent or irregular practices on the part of the officers in any one or more voting precincts, the county board has a right to inquire into the merits of such votes, or the conduct of such officers, but whether, when there are sent in to the canvassing board returns showing such an enormous number of votes as to be perfectly obvious that they are not true returns of legal votes actually cast, but simply manufactured evidences of an attempt to defeat the popular will, this court will, by *mandamus*, compel the board to accept as true these fraudulent returns and canvass, and declare the result as though they even *prima facie* showed the actual vote."

It will be observed from the above that the eminent jurist who wrote the opinion expressly eliminated from their consideration any case similar to the one at bar. Also, it is not alleged in the pleadings here that there were not as many legal voters in this precinct as there were ballots found in the box; nor are any reasons given by the respondents why they permitted, or why they could not have prevented, the spurious and excess ballots from being deposited in the box. Other cases cited by counsel are mostly where a dispute has

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arisen as to the counting or rejecting of some particular ballot upon account of the way it has been cast, which involves the performance of a judicial duty by the board.

In the case of *People ex rel. v. Hanes, supra,* it was sought, by mandamus, to compel the board to recount and recanvass ballots theretofore counted and canvassed by them, and on such recount to reject ballots theretofore counted and to count ballots theretofore rejected as void. The result of the election showed an equal number of votes for and against the local option question. The inspectors had rejected four ballots, one of which it was claimed should have been counted. They also counted a number of ballots which the relator claims were void, but had made complete returns of the result; in which case it was held that inspectors of election have both judicial and ministerial duties to perform, and, having performed both, that the judicial conclusion reached by them was not subject to change by mandamus. The court said they may not have reached the correct conclusion, but they have acted and exercised their judgment, and the conclusions reached by them cannot be reviewed herein.

To the same effect is the case of *County Judge v. Kenner,* 105 Ky. 517, where the canvassing board met, as provided by law, and acted upon the returns made to them; there was no complaint of their failure to discharge the duty imposed upon them. The complaint was that they decided wrong, and counted ballots which they ought not to have counted. It was held that in this respect they were invested with judicial functions.

The same principle is announced in *Corbett v. Naylor, supra,* where it was held that where the votes cast had been counted by the moderator, the result announced, and the ballots sealed up and delivered to the state returning board, mandamus would not lie to compel the moderator to count a certain ballot in favor of the petitioner, that all that could

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be accomplished by mandamus would be to compel the moderator to use his judgment in counting the ballots (which he had done), and not to direct him how to count them.

The case of *People ex rel. v. Bell et al., supra,* is quite similar to the case at bar. In that case a mandamus was sought against two judges of election to compel them to sign and certify as correct, a report, which had been made by two other judges, of the vote cast in the precinct, in which the four had served as judges, or inspectors of election, as they are called in New York. It was shown, that, after the closing of the polls, they counted the ballots cast and ascertained the result, but refused to affix their signatures, upon the ground that fraudulent votes were cast by persons who were not registered, but who falsely personated registered voters, and who, upon being challenged, complied with the statutory test in taking the oath. In which case it was held that it was their duty to make return of all the votes cast, and of each to attach his signature to the return, and that a peremptory writ of mandamus was properly granted. Upon this subject the court, at page 185, said:

"They are bound to an exact obedience of the particular commands which the law has laid upon them as its officers, and they may not act on their own opinions or knowledge."

Upon the question of frauds the court, among other things, said:

"If, with all the safeguards with which popular elections are legally and naturally surrounded, frauds are perpetrated, the tribunals are open, and laws and a system of procedure exists, for the punishment of the offenders and for the rectification of consequent errors."

This reasoning is in harmony with our conclusions. The actual count, and determination of the result of the count of the ballots, when honestly exercised in

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good faith, has always been the exclusive province of the judges of election, as where there is a dispute as to the count, or the result of a ballot, to be determined from what is shown upon its face, and their disposition of it, so far as their action is concerned is judicial, and is not subject to review by mandamus other than to compel them to certify the result of such action; but in the case at bar, by their answer, the respondents eliminate all these questions by setting up the fact of the result of the count, and by failing to deny the facts stated by the relator. In other words, in the performance of their judicial duties, they have determined all questions over which the court, by mandamus, could not dictate the result of their action, the only thing left was to certify the result which cannot be refused by raising a question which is not properly triable in an action of this kind.

At least twice this court has held that the regular duties of the county board of canvassers are purely ministerial, and where the returns are substantially regular upon their face, their only duty is to count and certify the result of the vote as certified to them by the judges of election.—*Kindel v. Le Bert*, 23 Colo. 385; *Lehman v. Pettingell*, 39 Colo. 258.

In Pennsylvania, where the return judges of two counties composing a senatorial district, made a due return in their respective counties for the votes for senator, and where the return judges of the whole district refused to sign a certificate of election, for the reason, as they alleged, that fraud and bribery had been made use of in obtaining votes to so large an extent as to vitiate the election, or change the result, it was held that they could be compelled, by mandamus, to sign a proper certificate and that they were bound to certify that the person appearing, by the county returns, to have the greatest number of votes, was elected, that in that case the senate is the only tribunal to investigate charges of fraud, etc., in the election of one of its members; in

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which case, among other things, the court said, in substance, that to allow this as a defense for the failure to comply with their duty would simply be preposterous, and that the return judges had no jurisdiction of the existence of alleged frauds in the election, and that their plainly expressed duty in certifying the returns clearly excluded the exercise of any other duty incumbent with it.

To the same effect, in substance, are the cases of the *State v. County Judge,* 7 Iowa, 188; *Dalton v. State,* 43 Ohio St. 652; *Lewis v. Commissioners,* 16 Kans. 102; *Holt v. People,* 102 Ill. App. 279.

Respondents make the contention that the writ should not be granted, for the reason that they, as judges of election, in the performance of their duties as a canvassing board, having adjourned, could not be required by law to reconvene for the purpose of making another certificate; as they had no power to reconvene, the courts cannot compel them to do what they are powerless to do themselves. We do not think this position is well taken. In the first place, the purported return, setting up certain facts and stating that on account thereof no election had been held, was no return at all. Second, if their position is correct, it would apply to at least two of the county board of canvassers in all counties throughout the state where the county clerk calls to his assistance two justices of the peace.

In the case of *Lehman v. Pettingell,* 39 Colo. 259, this question was directly raised, in commenting upon the fact this court said:

"The fact that the board may have adjourned without completing its work we do not regard as material. The board can be compelled by mandamus to reconvene to make a canvass of the returns from all the precincts whenever it appears, by proper petition, that it has failed to do so."

We think the same principle is applicable here, and that the court committed no error in this respect.

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The contention is also made that the court erred in compelling the respondents to act in a certain manner, to-wit, to sign the returns theretofore signed by Moran. It is contended that the extent of the court's jurisdiction was to compel the respondents to act, and that it was without jurisdiction to compel action in a certan manner. We deem it unnecessary to pass upon this question, for the reason that if the trial court erred in this respect it was harmless error to the injury of no one. By the statements and admissions in their answer, it is shown that when the respondents comply with the law, the result of their actions can not be other than as contained in the Moran certificate, for which reason that portion of the order compelling them to make a certain return instead of making a return, if erroneous, was entirely harmless as against them, or any one to be affected by it.

At the oral argument, the further contention was made that the proper parties are not before the court. Two positions were urged in this respect: first, that under the provisions of the statute pertaining to the canvass of the returns of a school election, in order to secure the relief prayed for, the judges of the election for each of the thirty-one precincts in the City and County of Denver, must be made parties. It is claimed the rule is that where all parties necessary are not before the court, the writ will be refused. The second contention is that at least the other judge of this precinct, Moran, must be made a party; that he was not so made, and for that reason the writ should have been refused. Neither of these questions was raised in the court below; nor is either of them covered by the assignments of error or the briefs, for which reasons, it is not incumbent upon us, at this time, to make any ruling thereon. The first was expressly eliminated by the answer of the respondents themselves, wherein they state,

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"That they are without definite information as to what was done by the judges of other precincts on the occasion referred to, and respectfully suggest, that for the purposes of this proceeding, what was done by other judges in other precincts, is immaterial."

Having taken this view at the trial and having had their case disposed of accordingly, they ought not now be allowed to change their position and allege that the action of the other judges was material and that they were necessary parties.

The record discloses that the other judges, including Moran, for this precinct, had already executed and signed their respective returns, and while, for the reasons stated, we deem it unnecessary to establish a precedent by passing upon the question of whether they were necessary parties, it appears that if the writ was issued against them, it would only be to command them to do what they had already done. By their answer the respondents concede it was their duty to make a return for this precinct; their defense is that they did so and the case appears to have been disposed of along these lines presented by them. The record being as it is, we do not think the respondents are in a position to raise either of these last two questions. Should the relator, upon account of her failure to have the necessary parties in court, fail to secure the desired result in establishing *prima facie* her title to the office, that would be her misfortune, but would work no injury to these respondents and is no excuse for them, after having waived these questions by failing to raise them in the court below, to now have the right to present them, for the first time, in this court.

The judgment is affirmed. *Affirmed.*

Decision *en banc.*

Mr. JUSTICE MUSSER dissents.

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[No. 7198.]

STUMPFF V. THE PEOPLE.

1. CRIMINAL LAW—*False Pretenses*—Mere non-disclosure is not a pretense, even though if disclosure had been made it would have deterred the prosecutor from parting with his money—(203).

The sale of chattels which are subject to an existing mortgage, without informing the purchaser of the incumbrance, is not a false pretense within the statute (Mills Stat. Secs. 1378, 1379, Rev. Stat. Secs. 1848, 1849), even though the title be warranted by the seller—(203).

2. ——*Pretense Not Relied On*—A false pretense not relied upon is not within the statute—(204).

3. ——*Other Crimes*—That the accused violated the statute prohibiting the sale of mortgaged chattels without advising the purchaser of the mortgage (Mills Stat. Sec. 392, Rev. Stat. Sec. 524), has no relevance to an information charging the obtaining of the money by false pretenses—(203).

Error to Teller District Court—HON. JOHN W. SHEAFOR, Judge.

Mr. T. B. MCDONALD and Mr. T. E. MCINTYRE for plaintiff in error.

HON. JOHN T. BARNETT, attorney general, and Mr. ELMER L. BROCK for defendant.

CHIEF JUSTICE CAMPBELL delivered the opinion of the Court:

Defendant was convicted of obtaining money by false pretenses, and was sentenced to the penitentiary. Several fales representations and pretenses are set forth in the information. The only one relied on and concerning which alone there was evidence, is that, in selling to the prosecuting witness Johnson a cow defendant obtained from the purchaser $30 in money by falsely representing that the animal was free from all encumbrances whatsoever, whereas there was a valid existing chattel mortgage upon it. A motion to quash was filed, based upon the contention that the informa-

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tion was too indefinite and uncertain to apprise defendant of the nature of the charge against him. It was overruled and defendant says this was error. As the evidence does not prove the charge made, we shall not consider the ruling on the motion.

There is not a word of evidence that any representation or pretense was made by defendant to the prosecuting witness, or to any one else, about a mortgage. He was neither asked by the purchaser, nor did he state, anything about any encumbrance, as the prosecuting witness himself testifies. There was no reference or statement in the bill of sale, which at the time defendant gave to the purchaser, about a mortgage, and the prosecuting witness says that the instrument contains every representation made by defendant on that subject. The most that can be said of it is that therein defendant vendor may have warranted the title to be good, and agreed to defend it. Under the law of this state a mortgagor of chattel property holds the title, subject only to the lien of the mortgage, which, before default, and in the absence of false representations, he may sell and convey without violating this statute with reference to false pretenses. We have another statute which makes it a crime for the mortgagor to sell mortgaged property without the written consent of the mortgagee, but defendant is not being prosecuted thereunder and it has no bearing upon any question involved in this case. *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384. The Attorney General does not claim that any false verbal statement was made by defendant at the time of the sale, but seeks to bring the case as made within the false pretense statute, upon the theory that the silence of defendant with reference to the chattel mortgage is of itself a false pretense and misrepresentation. The general rule is that the mere non-disclosure of facts known to defendant, even though a disclosure thereof would operate to deter the prosecuting witness from parting with his money, is not a false pretense. 19

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Cyc. p. 403. And this is true, even though a false pretense may be proved by the acts or conduct of the defendant as well as by his words. In *People v. Baker*, 96 New York 340, EARL, Justice, in delivering the opinion of the court, expressly held that mere silence and mere suppression of the truth, upon which another may act, is not sufficient to constitute the crime of false pretenses. But if it can be held that the failure of defendant to disclose to the prosecuting witness that there was an existing mortgage upon the cow at the time of the sale is sufficent to constitute the crime of false pretenses under our statute, it is enough here to say that the information should have so charged. It does not do so; but, on the contrary, expressly alleges that defendant made a false representation and false pretense that the cow was free and clear from all liens and encumbrances of every kind whatsoever. The mere silence of defendant at the time of the sale, or concealment of the existence of a mortgage, is not proof of this charge of a positive false verbal representation.

Moreover the prosecuting witness testifies that he did not rely upon any representation of defendant with reference to a mortgage, and that none was made, but that he did rely upon the bill of sale, apparently meaning that he relied upon the supposed warranty which it embodied. While a promise added to a false pretense will not, of itself, acquit a defendant, yet, when the prosecutor does not rely upon the misrepresentation, but on the warranty, this particular statute is not violated. *Jackson v. People*, 18 Ill. App. 508. Manifestly the charge in the information was not proved by the evidence. The judgment is therefore reversed.

Reversed.

Mr. JUSTICE WHITE and Mr. JUSTICE BAILEY concur.

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[No. 7201.]

EHRHARDT V. THE PEOPLE.

1. CRIMINAL LAW—*Evidence—Dying Declarations*—Declarations made at a time when the declarant expects to recover are not admissible as dying declarations—(206).

2. ——*Res Gestae*—Declarations of the person whose murder is charged, made at a time which is not fixed but subsequent to the commission of the injury, and which are merely expressions of his or her opinions as to the guilt of the accused are not *res gestae*—(206).

3. ——*Report of Testimony at Inquest*—The report of the testimony of an immature and ignorant witness, at the coroner's inquest, varied from the testimony of the same witness, when examined for the people upon the trial of the indictment. Held that the district attorney might cross examine the witness, in order to refresh her memory, and endeavor to induce her to return to her statement at the inquest—(207).

But the report of her testimony before the coroner, tending to show the guilt of the accused, was held inadmissible, and its admission fatal error, not cured by its subsequent exclusion—(207, 208).

Error to Denver District Court—HON. GEORGE W. ALLEN, Judge.

Mr. H. N. SALES and Mr. T. E. MCINTYRE for plaintiff in error.

HON. JOHN T. BARNETT, attorney general, Mr. JAMES H. TELLER for defendant in error.

CHIEF JUSTICE CAMPBELL delivered the opinion of the Court:

The defendant was indicted for killing his wife by means of poison. The jury found him guilty of murder of the second degree and recommended him to the mercy of the Court. By section 1624 Revised Statutes 1908 all murder which shall be perpetrated by means of poison shall be deemed murder of the first degree. The abstract of the record does not contain the Court's charge, but the evidence, as abstracted, does not call for an instruction as to murder of the second degree. Why the

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jury so found we do not know and speculation about it is useless. Counsel has made no argument that defendant was prejudiced by this action, but we observe that it is inexplicable. If defendant administered poison to his wife and she died from its effects, he was guilty of murder of the first, not the second, degree. If he did not so kill her, he should have been acquitted.

The judgment must be reversed for other reasons. There was error in permitting witnesses for the people to testify as to alleged declarations of the deceased which are supposed to show defendant's connection with, or commission of, the homicide. In substance they were: "I believe I am poisoned * * * He (meaning her husband) has poisoned me. * * * I didn't think he would do it, but he did. * * * Do you think he would do such a thing?" There is no attempt by the Attorney General to justify their admission upon the ground that they were her dying declarations, for the obvious reason that they were made at a time when she expected to recover. The declarations testified to, if not a history of past transactions, are nothing more than expressions of opinion that her husband poisoned her. The evidence, as a whole, might indicate that such was the conclusion of Mrs. Ehrhardt from certain other facts testified to by other witnesses supposed to have a tendency to show that her husband procured poison and gave it to her. But the declarations of Mrs. Ehrhardt were not in connection with, or a part of, any testimony by her that her husband did so, and they were made some time, it does not appear how long, after the supposed act of the defendant. Under the decision of this court in *Herren v. The People*, 28 Colo. 23, these declarations were not admissible as part of the *res gestae*.

At the coroner's inquest, held shortly after the death of Mrs. Ehrhardt, her little girl, eight years of age, testified. What she then said was reduced to writing by a policeman. At the time of the trial this child

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was called for examination by the prosecution. Upon her direct examination her testimony was materially different from this writing and was not harmful to defendant. By permission of the court, and without objection of defendant's counsel, the District Attorney asked her leading questions and cross-examined her with a view to get her to change her testimony so as to make it harmonize with the writing. The girl, in some respects, changed her testimony. It was, however, more or less contradictory and, in itself, may not have been very harmful to defendant. Yet, as we read the record, her testimony, in so far as it harmonizes with the written statement of the officer, constitutes the only evidence which connects defendant with the perpetration of the crime with which he was charged. The defendant objected to the production before the jury of the written statement of the officer, which was admitted in connection wth the cross-examination of the girl conducted by the District Attorney in the presence of the jury. The court, over defendant's objection, allowed all this procedure to take place in their presence and admitted the writing in evidence. Afterwards it was withdrawn from the consideration of the jury. The Attorney General argues that though some of the evidence thus brought before the jury was inadmissible and the procedure permitted by the trial court was calculated to prejudice defendant, yet, inasmuch as the testimony of the girl was so contradictory and of so little weight, the proceedings which we have detailed might be deemed not prejudicial. We do not think so. The District Attorney might properly cross-examine the witness, who was not only immature, but ignorant, and evidently frightened and excited, in order to refresh her memory and to get her to say on the stand what he claimed she had said before the coroner. But the statement of the officer, which the court in withdrawing it from the jury said was clearly not her statement, but the language of the officer himself, and merely his con-

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clusions of what she then said, ought not to have gone to the jury for any purpose. Its subsequent exclusion, in the circumstances disclosed by the record, did not remove the inevitably unfavorable impression which its admission produced. The jury might very well conclude that the declarations of the child made recently after the death of her mother were true, and that her testimony at the trial, which was quite different, and in some particulars directly contradictory, was induced by the act of the defendant, or due to the natural affection which the child had for her living parent. And so the excluded testimony may have been, and quite probably was, the very evidence on which the verdict was based. It seems also that the contents of this written statement were commented on by the District Attorney in his argument to the jury. We are firmly convinced that serious and prejudicial error resulted to defendant in at least these two particulars discussed. There are other assignments which present grave and important questions, but, as the judgment must be reversed for the reasons given and as these other questions may not arise again in the event of a new trial, we do not consider them.

Judgment reversed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

[No. 7449.]

TANGEMAN V. BOARD OF ALDERMEN OF CITY AND COUNTY OF DENVER.

STATUTES—*Construed*—The Charter of the City of Denver provided that "an elective officer may be removed from office by petition of the electors, and an election thereunder, but no person shall be so removed from office, within six months after his election thereto."

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Held that the purpose of the statute was to provide for the recall of an officer after he had served for the specified period, and had thus been placed on trial; that no other purpose could be rationally attributed to this limitation of the time within which a recall might be had; that the phrase "after his election thereto," imports not only the entire procedure for ascertaining the public will, but the induction of the candidate into office; that, therefore, a petition for recall, presented within less than six months after the officer had been admitted to his office—as the result of a contest of his election,—though within more than six months from the day upon which the election was held, was premature—(218, 219).

Cases cited showing the various meanings ascribed by the courts to the word "election," under varying circumstances—(214, 217).

Error to Denver District Court—HON. HARRY C. RIDDLE, Judge.

HON. BENJAMIN GRIFFITH, attorney general, Mr. E. W. HURLBUT, Mr. E. P. COSTIGAN, Mr. FRED W. PARKS, Mr. C. F. CLAY, Mr. HALSTED L. RITTER and Mr. BERT MARTIN for plaintiff in error.

Mr. HENRY A. LINDSLEY, Mr. G. Q. RICHMOND, Messrs. BICKSLER & BENNETT for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

On March 3, 1911, the plaintiff in error filed his petition for mandamus in which he alleges, in substance, that the respondents (defendant in error here) are the Board of Aldermen of the City and County of Denver; that the petitioner is a qualified elector residing in the ninth ward in said city and brings this action for himself and on behalf of one thousand nine hundred and nine other qualified electors residing in said ward, who, together with himself, had signed a petition to recall Cornelius C. Worrall, the alderman of said ninth ward. Then follows a copy of the petition in which they petition to recall the said Worrall, who had been declared by the Board of Aldermen to be the alderman elected at the city election, May 17, 1910, in the said ninth

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ward, etc., and petition that a special election be called and held in said ward, according to the charter for the purpose of electing a member of the Board of Aldermen for said ward. Then follows the alleged grounds upon which it is sought to remove Worrall, which are, in substance, that Worrall was legally defeated by his opponent at the election May 17, 1910; that the election commission so declared and that the recount by the committee of the Board of Aldermen in the contest instituted by Worrall against Chamberlain so found; that not one of the charges made by Worrall in his statement of contest filed with the Board of Aldermen was sustained; that no evidence was introduced in support of any of them; that carelessness on the part of some of the election officials in a few precincts was discovered in counting the ballots; that such mistakes were wholly insufficient to change the majority in favor of Chamberlain; that, knowing all this, Worrall demanded from the Democratic members of the board that they brush aside all law and justice and by force of their majority in the board seat him, and unseat Chamberlain; that his demand was granted and a most grevious wrong inflicted upon not only Chamberlain, but the citizens of the ninth ward, who had decided, by their votes, that Mr. Chamberlain was their choice for alderman; that the signatures of the petitioner and said one thousand nine hundred and nine other qualified electors constituted more than twenty-five per cent. of the vote cast in said ward for all candidates for alderman at said election; that said petition was duly filed with the clerk of the city on the 20th of January, 1911.

The petition contained the further fact, that on May 27, 1910, the election commission declared Chamberlain was elected alderman for said ninth ward; that on June 3, 1910, Worrall filed with the Board of Aldermen a contest against Chamberlain and that the Board of Aldermen did, thereafter, at a regular meeting held on the 20th of December, 1910, decide said con-

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test in favor of Worrall, and declared him to have been elected alderman from said Ninth Ward at the election held on the 17th day of May, 1910; that said Worrall is a duly elected, qualified and acting alderman from said ward; that more than six months had expired after his election before said petition was filed, then follows certain sections of the charter of the City and County of Denver, which will hereafter be referred to.

An alternative writ of mandamus was issued, returnable March 6, 1911, at which time the respondents filed their answer, which, eliminating many contentions, presents two questions (which were the principal ones considered by the trial court). In the first, they allege that the election was held on the 17th day of May, 1910; that the election commission, on the 27th of the same month declared Chamberlain elected; that on the 3rd of June following, Worrall filed a contest; that on the 20th of December, following, the council decided the case in favor of Worrall and did then declare Worrall elected as Alderman from said ninth ward, but denied that said board declared Worrall elected at the election held on the 17th of May, 1910; on the contrary allege that the board only determined that Worrall received a plurality of the legal votes cast over and above the votes cast for Chamberlain and sustained the contest of Worrall, and then and there, on the 20th day of December, 1910, declared Worrall elected alderman from the ninth ward and denied that six months had elapsed and expired after the said election of said Worrall, for these reasons they claimed the petition was premature in time.

The second defense pertains to the provisions of Section 22b of the charter providing for the recall, among other things, it states:

"An elective officer is subject to recall as herein provided and may be removed from office by a petition of the electors and an election held thereunder, but no person shall be so removed from office within six

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months after his election thereto. The petition shall name the officer to be removed * * * and shall contain a statement of the grounds upon which it is sought to remove him."

The respondents allege that the petition does not comply with the provisions of said Section 22b, but that the same is in violation of its provisions; that the said petitioners, by virtue of said petition and the matters therein recited, were not entitled to have the city council call the election, for the reason that the petition does not set forth any act of omission or commission done or performed by the said Worrall during the time he has served as a member of the Board of Aldermen, nor does it contain any statement of the grounds upon which it is sought to remove him, as contemplated by section 22b of the charter; and the respondents denied that Worrall deliberately or in any manner demanded from the democratic members of the board that they should ignore all law or any law, or ignore justice in the determination of the contest between Worrall and Chamberlain, and denied that Worrall demanded that they, the Board of Aldermen or the democratic members thereof, should, by force of their majority in the board, seat him as alderman from said ninth ward and unseat Chamberlain. They denied any demands by Worrall other than those legitimately presented by the contest proceedings.

Upon the filing of this answer the petitioners, without offering any evidence, made application to have the alternative writ made peremptory; this application was denied and the alternative writ discharged. The petitioners bring the case here for review upon error.

In passing upon these two defenses, among other things, the learned trial judge said:

"There is a matter of public policy involved in this proceeding. It was a matter of common notoriety at the time this recall provision was adopted—I think the

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court is justified in taking judicial notice of that—that this matter was presented to the people of this community, and votes were solicited for this recall, upon the theory that it would give the citizens of the city of Denver an opportunity to recall elective officials who were guilty of malfeasance or non-feasance while in office, and I do not think that this section can be stretched in its application to a set of facts so as to include an individual who is not charged with any misconduct or any wrongful act and which resulted in his being given a certificate of election by the Board of Aldermen. It is true the allegation is that he deliberately demanded that they brush aside all law and justice and by force of majority give him a seat; but it is not alleged that he had any part in casting a vote of bringing about that result, except as he might by argument prevail on those who had the power and the authority under the charter to determine that result.

As a matter of public policy, it is essential that there be some restraint thrown around the exercise of such a right as this. I do not mean by that to invade the province of the people of this state or of this city in any way, but it must be looked at from a reasonable standpoint; there must be some justification for a petition of this sort, and if called upon to determine this question upon that ground I think the writ would be denied. However, we prefer not to put it on that ground and shall not do so.

* * * Under the Charter of the City and County of Denver, the aldermen are the sole judges of the qualifications, election and return of their own members; and under this petition it appears that on the 20th day of December, 1910, at a regular meeting thereof, the Board of Aldermen decided said contest in favor of said Worrall and against the then incumbent of the office—Mr. Chamberlain.

In view of the construction to be given the term "election" as used in this charter, that the person

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against whom the petition for recall is directed shall not be so removed from office within six months after his election thereto, this application is prematurely presented and, without going into any other matters, I do not feel justified at this time in requiring the Board of Aldermen to call this election, and the writ will be discharged."

If the position of the trial court in his construction of the word "election" as used in the charter is correct, none of the other questions need be considered. In placing a construction upon the word "election" as used in this section of the charter, it is necessary to take into consideration the sense in which it was being used and what was intended to be accomplished.

The authorities cited clearly demonstrate that the word "election" has many definitions; when applied to elections as the term is generally understood, a construction given it when used in one legislative enactment may not be at all applicable or proper when applied to another, but when used in a different sense, a different meaning is proper and is so applied to the same word; for instance, in the cases cited by the petitioner, that of *State ex rel. Harris v. Tucker*, 54 Ala. 205, involved a contention over the time within which a sheriff's bond should be approved. On the one side it was contended that the fifteen days allowed began to run from the date of the certificate of election given by the Secretary of State; on the other, it was contended that the time began to run from the date on which the election was held. Thus it will be seen that accepting either contention, the object to be accomplished was to have all sheriffs give a bond and have it approved prior to the time of their induction into office, and that court held, when considered in the light in which it was being used, it meant fifteen days after the date the votes were actually cast.

To the same effect is the Collings' case (Pennsylvania) reported in Brightly's Leading Cases on Elec-

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tions, 503, where it was provided that a petition for contest of election should be filed within ten days after the election, in which case it was held that the word "election" in the sense in which the expression was used, meant the regular election day, within its popular sense, to-wit, the date upon which it was actually held and the requirements and duties of that day.

In the case of *Seaman v. Baughman,* 47 N. W. (Iowa), 1091, the word "election" as used in Section 6, Art. 2 of the Iowa constitution was construed; it was held that as there used it refers to a choice of persons for public office, but has no application to the meetings of electors of a district township, for the transaction of the general business of the township. This case involved the validity of a tax for the construction of a school house where the vote was not taken by ballot and it was not clear how the vote was taken; it was held that the word "election" as named in the constitution, did not apply at all.

The case of *Ex parte Conley,* 75 S. W. (Texas) 301, involved the legality of the election, which was held invalid upon account of the failure to post one of the five notices for the requisite number of days preceding the election, as required by law. It was held the word "election" as there used meant the act of casting and receiving the ballots from the voters, counting the ballots and making returns thereof, and that as there used it must be so construed, there being nothing in the law to suggest that the legislature intended to use it in a different sense, in contradistinction to acts which are to be done preparatory to election.

On the other hand, in the case of *State v. McCoy,* 43 Atl. (Del.) 270, it was held that the words "an election" under the constitution of Delaware, mean and involve every element necessary to the complete ascertainment of the expression of the popular will, embracing the entire range from the deposit of the ballot by the elector up to the final ascertainment and certificate

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of the result; that an election by the people means and includes the perfected ascertainment of such result.

In the case of *State v. Wilroy*, 32 N. C. 329, it was held that the word "election" as used in Revised Statutes, 1833, chapter 24, sec. 6, respecting appointments to fill vacancies in the office of constable, and providing that the person so appointed shall be qualified to act until the next election of constables, should be construed to mean not only the act of choosing, but the act of choosing and inducting into office.

In the case of *Bowler v. Eisenhood*, 12 L. R. A. (S. D.) 705, where the election was held November 4, 1890, on November 22nd, upon account thereof, the Auditor, vened and proceeded to open the returns from the various precincts and make abstract of the votes as provided by law. On November 14th, at an adjourned meeting the canvass disclosed that two candidates had an equal number of votes for the office of Sheriff, and on November 22nd upon account thereof, the Auditor, pursuant to law, proceeded, publicly, to decide by lot which of the persons so having an equal number should be declared elected; it was held that the twenty days allowed for contest did not commence to run until the time it was decided by lot on November 22nd and the defendant declared elected, although it was shown that the canvass had been closed on November the 14th.

In the case of *People ex rel. Conless et al. v. North*, 72 N. Y. 124, the Board of Aldermen made a certain appointment, after the date of the election and upon the date when, but before, the new members qualified, and before their election was duly certified and declared by the old board. It was held it could not be determined that they had been elected before it was duly certified and declared, and that under the provisions of the statute, the election of a ward officer is not complete until it shall have been declared and certified to by the common council; that these declarations and certificates are indispensable for the purpose of consummating the

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election and qualifying the candidate to enter upon his office. In which case, the court said:

" * * * An examination of the whole section shows, we think, that its intention was to provide for the manner in which the election of the candidate should be consummated and officially declared; and that until these acts are done, his election is not complete, and he is not qualified to serve."

This same doctrine is maintained in principle upon cases where it is sought to secure an office by *quo warranto.*

In the case of *Carlson et al. v. The People,* 118 Ill. App. 592, it was stated,

"* * * where such directions are given for ascertaining and declaring the result of an election, they must be complied with before the candidate receiving the highest number of votes is entitled to the office, and that until those steps are taken such candidate cannot obtain the office, or oust the incumbent by *quo warranto,* but that if the proper officers wrongfully fail to discharge their duty the remedy is by mandamus to compel them to canvass the returns and declare the result."

This summary of the authorities cited fully demonstrated the correctness of the conclusion that the construction and meaning of the word "election" must be gathered from the sense in which it is used, when considered in the light of what was intended to be accomplished as disclosed by the charter.

The contents of section 22b, commonly designated the recall section, are comparatively new in our system of government, and the interpretative branch of the law is in rather an undeveloped state on the subject. So far as we have been able to ascertain there appears to have been no adjudicated cases upon the question under discussion.

When considered in the light of what was sought to be accomplished, it was evidently the purpose of the

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framers of this section of the Denver charter to engraft therein a provision providing, under certain circumstances, by a vote of the people, for the recall of any elective officer of the city, after he had served and been thus placed upon trial for a certain period of time; in substance, the charter provides for an answerable or responsible tenure in all elective offices, and the holder of such an elective office may be removed, after the expiration of a certain period, by the electors qualified to vote for his successor. This seems to be recognized by the authorities cited by the plaintiff in error, and if it was not intended to allow him this period of probation before he was subject to recall, then we are unable to ascertain what this period of time was placed in the charter for at all. The rule is elementay that it is not to be presumed that language placed in the charter should have no meaning or effect, for which reason we think the rational construction, and only one, to be given that portion of section 22b is that it was intended that an alderman should not be subject to recall until he should have served in the performance of his duties as such for the period of six months, and that as used in this section the language "but no person shall be so removed from office within six months after his election thereto" was intended to mean that the incumbent should be in office for the period of six months before he was subject to such removal; that the words "after his election thereto" were meant to include the entire procedure of election, including the ascertainment of the result and his induction into office, and when considered in the light of what is sought to be accomplished, we cannot conceive how any other construction can possibly be placed thereon. If this language "within six months after his election" does not mean that he should have the right to serve a period of six months and during that time demonstrate to his constituency his fitness for the position, then we are unable to understand and have not been advised, what it does mean. If it does

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not mean to give him a tenure in office for a definite time certain before he is subject to recall, then why is it there at all and what is its object? If it can be argued that the object was to prohibit any other election within this six months after the general city election; we suggest this could not have been what was intended for the reason that the charter does not so provide, but, on the contrary, it evidently provides for other special elections upon sundry questions during this period. Besides, as a general rule, in such charters, as in this one, the mayor, sometimes the Board of Supervisors or some of them, are elected at different elections than the particular Board of Aldermen, some such officers for a four year term, the Board of Aldermen for a two year term, and we have not been cited to any other provision of the charter which would prohibit an election for the recall of some of these other officers within this same six months period.

So far as we are advised, there is no provision of the charter which limits the number of elective officers to be recalled, or the number of elections to be held for that purpose after this six months has elapsed, and it is not consistent to presume that even an unavailing effort was attempted by this language to guard against repeated elections, or any elections during this six months, after the regular election, and thereafter leave the field open for as many elections, and at as many different times as twenty-five per cent. of the constituency of each elective officer might desire, when they thought they had just cause therefor. We think the authorities cited by the plaintiff in error, and so earnestly relied upon by his counsel in support of other contentions, are in harmony with these views upon this subject.

In the case of *Good v. Common Council*, 90 Pac. (Cal.) 44, it is said:

" * * * By virtue of this provision every elective officer elected after the adoption of the amendment holds office subject to the condition subsequent

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that 25 per cent. of the electorate of the district from which he was elected may by petition express their disapproval of his action upon some measure or as to some policy, and demand that he be sustained by a vote of confidence or retire."

In which case the court also said:

"* * * There is no doubt that the provision here under consideration, and similar ones in other city charters, are intended to check a growing forgetfulness on the part of officeholders of the principle that the duties of their offices are to be discharged in the interest of the public and not their own."

Applying this reasoning to the case at bar and the object sought to be accomplished (evidently good government in all municipal affairs), it was certainly the intentions of the framers of this charter that the successful candidate should have six months trial in the performance of his official duties within which to make good, before any effort was to be entertained looking toward his recall. In the San Diego case upon the question of the reasons for his recall, the court said:

"The reason why the removal is asked in this case, and the grounds upon which the petition for recall rests, are that the councilman whom it is sought to remove voted for and supported a certain ordinance regulating the licensing and sale of liquors in the city of San Diego; that he voted to disregard a former petition for his recall; that he repeatedly voted to disregard petitions to refer to the vote of the people ordinances passed by the council of said city, filed in conformity to the provisions of the charter; and that he voted for a false certification of an ordinance to prevent a referendum."

It will be observed they are all upon account of acts committed by the councilmen, while in office. It is alleged that as such official he did many things sufficient to justfy his recall, while if the construction of the petitioner here is correct as to the meaning of the word "election" as used in this charter, a system of pro-

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cedure is created whereby, under certain conditions, where a councilman was seated by contest proceedings which promulgated a long and continued fight before its ultimate determination, he could be recalled before he ever had an opportunity to take his seat or perform any official duties, or at least the proceedings could be instituted immediately upon the date which he was inducted into office, and without any reference to any act performed by him as such officer. We do not think it was intended that such a construction should be given to this section as would ever permit such a condition to arise.

The other case relied upon by the plaintiff in error, that of *Hilzinger v. Gillman*, 105 Pac. (Wash.) 471, in speaking upon this subject and the term of an officer thereunder, among other things, the court said:

" * * * His term, while in a measure fixed, was subject to the condition subsequent that 25 per cent. of the electorate of the ward from which he was elected could by petition express their disapproval of his official action upon one or more measures of local policy, and demand that he be sustained by a vote of confidence or retire."

Applying this announcement to the case at bar, or to one rather where the entire six months had elapsed after the date of election (as construed by the petitioner), and before the date of his induction into office under a contest, in such a case he would have performed no official actions *upon one or more measures of local policy*, in fact could have done nothing officially subsequent to the date upon which he was voted for; so that upon the reasons set forth by either of these authorities, the only conclusion that we can deduce therefrom is that the language of the charter means as above indicated, and that the trial court committed no error in so holding.

In arriving at this conclusion, we are not unmindful of the ruling of this court in the case of *Carlile v.*

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Henderson, 17 Colo. 532, where it was held that the word "election" as used in Art. 5, Sec. 30 of our Constitution meant a date previous to the time the party could have been inducted into office. That section, among other things, provides that 'no law shall increase or diminish the salary of any public officer after his election or appointment.' In which case it was pointed out that in the sense there used any other construction would defeat the objects intended to be accomplished by the section. At page 536, the court, speaking through Mr. JUSTICE ELLIOTT, said:

"We have endeavored to construe section 30 according to the plain, ordinary signification of its words. No reason is perceived for resorting to any other rule since such construction best effectuates the purposes of said section. Nothing in the line of partisan or personal legislation could be more mischievous than that the general assembly should have the power, at the opening of the legislative session, to rush through acts increasing or diminishing the salaries of those just elected to executive offices. The temptation to thus reward favorites, punish opponents, or make bids for executive favors, would be as great before such officers elect had qualified as afterwards. That it was the object of the constitution makers to prevent such evils cannot be doubted."

In harmony with these views we think our construction here best effectuates the purposes of section 22b of the charter, also that nothing in the line of partisan could be more mischievous than to allow twenty-five per cent. of the people of a district, when dissatisfied with the result of an election or a decision involving a contest, for these reasons and without any cause, so far as the official actions of the party declared elected were concerned, to secure a petition calling for his recall, compel him, and possibly his defeated opponent to go through the result of another election, as well as the annoyance, the burden and the expense to the tax-

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payers, without any reasonable grounds or just cause therefor, other than the defeat of their candidate, or the decision of the contesting tribunal, and we are confident from his reasons given in the Carlile case, if the distinguished jurist who wrote that opinion was still living and had this section of the charter under consideration that his conclusions concerning it would be in harmony with the views herein expressed.

The sufficiency of the grounds for removal stated in the petition has been discussed by counsel at length; the plaintiff in error claims the people are the sole judges of the sufficiency of the grounds for recall. The defendants in error contend that the reasons stated in the petition are insufficient; as construed by them it fails to state any act of omission or commission of any official duty subsequent to his election. To support this position they cite the case of *Good v. Common Council, supra,* wherein the court said:

"A case of 'removal for just cause' in this sense implies some misconduct upon the part of the officer, or imputes to him some violation of the law. Under such circumstances it is necessary that the charges against him shall be based upon some refusal to obey or intention to violate the law prescribing his duties."

As the trial judge did not base his ruling upon this question and as we have decided he was correct in the reasons given for his decision, it is unnecessary for us to enter upon a discussion of, or make any finding concerning, this question, and our comments upon the quotations set forth from other opinions should be understood to be expressly limited to their bearing and reasoning upon the question being discussed by us, and not as giving any expression of this court's views upon the latter question.

The judgment is affirmed.

Affirmed.

Decision *en banc.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GABBERT dissent.

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[No. 4972.]

THE CITY OF DENVER ET ALS. V. RUBIDGE ET AL.

1. JUDGMENT—*Record—Conclusive Effect*—Where the judge of the court below finds and declares that the bill of exceptions was tendered within the rule, this finding will be accepted as conclusive in the court of review—(226).

So his certificate that the bill of exceptions contains all the evidence—(227).

2. BILL OF EXCEPTIONS—*Time to Tender*—The court of first instance may at any time during the term at which the judgment is rendered allow time to tender a bill of exceptions—(226).

3. ——*Requisites*—Even though the certificate to the bill of exceptions fails to aver that it contains all the evidence, if this is apparent from the bill itself, it will suffice—(226).

An exception to the final judgment must appear in the bill of exceptions. The clerk's note of the exception in the record is inapt, and without effect—(227).

4. ——*Time of Filing*—If the bill of exceptions is tendered within the time allowed for that purpose, the fact that it is not filed until the expiration of that period, is immaterial—(227).

5. APPEALS—*Harmless Error*—Allowing an amendment which in no way affects the rights of the opposing party is harmless—(228).

6. CONSTITUTIONAL LAW—*Conformity with Constitutional Requirements in Legislation*, may be determined by reference to the legislative journals. If therefrom it appears that the requirements of the constitution were not observed the attempted enactment is without effect. But where the complaint is that in one house the provisions of sec. 22 of art. V. were not complied with, mere excerpts from the journal of that house, not assuming to state in what manner the bill passed on final reading will not suffice—(228).

Whether the copy of the journals printed pursuant to laws of 1899 c. 109 is admissible in evidence, Quaere—(226).

7. DENVER—*Charter of* 1893—*Ordinances—Passage*—It is not required, under Sec. 20, Art. VII of the Charter of Denver of 1893 that an ordinance erecting a sewer district should receive the votes of two-thirds of all the members elect of the City Council. In view of the provisions of sections 3, 4, of art. II, a vote of two-thirds of a quorum in each house suffices, provided those so voting constitute a majority of all the members elect to the house in which the vote is taken—(229).

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8. ——*Local Assessments*—A complaint assailing an assessment for the expense of a district sewer averred that the Board of Public Works of the city is not a constitutional body; that the provisions of the charter relating to public improvements are unconstitutional; that the assessments were levied without regard to the question of benefits; that the natural slope of the land was sufficient to drain it; that lands without the district were benefited, and were not assessed; that lands within the district, and liable to assessment, were omitted; that the assessment of plaintiff's lands was excessive; that the system was a public, and not a local improvement; that it was not properly constructed; that the provisions of the charter as to the letting of contracts were disregarded; and that items of expense were improperly included. Held insufficient on the authority of Denver v. Dumars, 33 Colo. 94; Denver v. Londoner, id. 104, Spalding v. Denver, id. 72—(230).

Error to Denver District Court—HON. JOHN I. MULLINS, Judge.

Mr. H. A. LINDSLEY and Mr. H. L. RITTER for plaintiffs in error.

Mr. JOSHUA GROZIER for defendants in error.

Mr. JUSTICE GABBERT delivered the opinion of the court.

Rubidge and others, plaintiffs below, brought suit against the City of Denver and others, the purpose of which was to annul special assessments against their property, to defray the expenses of the construction of what is known as the Capitol Hill storm sewer, in the City of Denver. The trial was to the court, and judgment rendered for plaintiffs. The defendants have brought the case here for review on error.

The bill of exceptions is attacked by counsel for defendants in error upon several grounds:

1. Because the same was not tendered within the time allowed by the order of the court, to-wit: ninety days from July 2, 1904. This contention is manifestly without merit. In the first place, it appears that the order allowing the time for bill of exceptions was entered on July 20, 1904, and that time until ninety days

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from that date was given in which to tender and file the bill of exceptions; so that the contention of counsel for the defendants in error, to the effect that tendering the bill on October 10, 1904, was too late, is not borne out by the record. In the second place, it appears that the time within which the bill of exceptions was actually tendered to the trial judge was a controverted question of fact between the parties below, and that the judge determined, as a fact, that the bill of exceptions was tendered to him on the tenth day of September, 1904, which is within ninety days from July 2nd preceding. This finding must be treated as conclusive.

2. It is next urged that the court erred in entering the order of July 20, 1904, allowing the city an appeal to the Court of Appeals, and granting ninety days for bill of exceptions, because more than five days had then elapsed since the date of rendering judgment. So far as an appeal is concerned, the prayer therefor came too late; but the case was brought here by the city on error, consequently, the time within which an appeal is prayed is immaterial. The code provides that exceptions may be allowed, signed and sealed at any time during the term of the court at which such exceptions were taken, or at any time thereafter to be fixed by the court. The order fixing the time for bill of exceptions was at the same term the judgment was rendered, and the court had authority to fix the date at some time beyond the adjournment of the term when the bill of exceptions should be tendered for his signature and seal.

3. This court is requested to strike the bill of exceptions because the certificate does not state that it contains all the evidence introduced in the cause. The certificate may not expressly state that all the evidence introduced is transcribed into the bill of exceptions, but an examination of the bill itself discloses from other sources that it does contain all the testimony. Aside from this, counsel objected to the bill of exceptions below upon the grounds now urged. The court overruled

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this objection, thus determining that the bill of exceptions embraced all the testimony.

4. We are also requested to strike the bill of exceptions because it shows on its face that it was not filed, signed, or sealed before January 31, 1905, long after the time fixed by order of court within which the bill of exceptions was to be tendered. It is true that the date the bill of exceptions was signed appears to be January 31, 1905, but the bill was tendered within the time fixed by the order of the court, and that was sufficient to protect the rights of the parties tendering it.

5. It is next urged that the cause should not be reviewed here for the reason it appears from the record that no exception was saved or taken by the plaintiffs in error to the decree of the trial court. True, the record proper does not show an exception to the judgment of the court; but the bill of exceptions does. That is the place where an exception must appear, when necessary, to be of any avail.

The city was permitted to file an amended answer, setting up the plea that by virtue of section 34 of Article VII of the charter (1893), the plaintiffs "have waived any and all rights to question the power or jurisdiction of the City of Denver to construct the improvements, the quality of the work, the regularity or sufficiency of the proceedings, or the validity or correctness of the assessments; and that the plaintiffs are now barred and estopped from maintaining this action or otherwise questioning the validity of the assessment, or any matter in connection therewith." This plea was predicated on the fact that the action had not been commenced by plaintiffs within thirty days next after the assessing ordinance of which they complain was passed. Cross-error is assigned on the action of the court in allowing this amendment. It was filed several months before the case was called for trial, but counsel for plaintiffs contend that as it was, in effect, a plea of the statute of limitations, it was not filed in apt time. In

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the view we take of the case, it is unnecessary to pass upon this question, for the reason that it could not, and did not, in any manner affect the rights of the plaintiffs on any question involved.

The validity of the charter of 1893 was also attacked by an averment in the complaint to the effect that in the passage of the act the senate did not comply with section 22, article V of our constitution, which provides that no bill shall become a law unless, on its final passage, the vote be taken by ayes and noes, and the names of those voting be entered on the journal. To sustain this issue, plaintiffs introduced certain portions of the printed senate journal for the year 1893. These portions do not show in what manner the bill was passed on third reading. In determining whether the constitutional requirements with respect to the passage of bills have been complied with, resort may be had to the legislative journals, and if it affirmatively appears therefrom that the mandatory provisions of the constitution on the subject were not observed, then the bill is invalid. Merely introducing excerpts from the senate journal and nothing more, which do not purport to state in what manner the bill was passed on final reading does not make the affirmative showing required. In this respect the case at bar is clearly distinguishable from *Rio Grande Sampling Co. v. Catlin*, 40 Colo. 450. In considering the printed senate journal which was introduced, we must not be understood as holding that under the Act of 1899, page 240, the purported printed journal was admissible in evidence.

It is also alleged in the complaint that the ordinance creating the capitol hill storm sewer district, and authorizing the construction of a storm sewer therein, was never legally passed by the city council, for the reason that it was never passed by two-thirds of the entire membership of the two branches constituting that body. The averments of the complaint discloses that more than two-thirds of the supervisors voted therefor; that two-

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thirds of a quorum of the Board of Aldermen also voted for the ordinance; and that those voting therefor in the respective branches of the council constituted a majority of all the members elected to each branch. The claim is made by counsel for plaintiffs that because section 20, article VII of the charter requires that an ordinance directing the construction of a storm sewer must be passed by a two-thirds vote of the city council, that this means two-thirds of all the members elected to that body. We do not regard this contention as tenable. The latter part of section 3 of article II of the charter provides that "A majority of the members elect of each board shall constitute a quorum to transact business." Section 4 of the same article provides that "No action of either board, except an adjournment, shall have any force unless a majority of all the members elect shall have voted in favor thereof." From these provisions it is clear that what is meant by "city council" in section 20 *supra*, is a quorum of each branch, and that a two-thirds vote of each of such quorum, provided such vote constitutes a majority of all the members elect to the branch in which such vote was taken, was sufficient to pass the ordinance in question. This is what the averments of the complaint disclose. The fact that by section 4, in speaking of the two branches, it is provided that any action of either board, except an adjournment, must be sanctioned by a majority of all the members elect, clearly demonstrates that when the legislature, by the subsequent section 20 mentioned the city council, it was intended thereby to refer to a quorum, otherwise some appropriate expression would have been employed to designate that by "city council" was meant all the members elected to such branch. This conclusion is fully supported by *Southworth v. Palmyra & J. R. Co.*, 2 Mich. 287, where the court had under consideration a provision of the constitution providing "A legislature must pass no act of incorporation unless with the assent of at least two-

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thirds of each house;" and it was held that the term "house" meant a quorum to do business, because by a previous provision it was declared that "A majority of each house shall constitute a quorum to do business." In addition to what has been said, it appears that the averments of the complaint on the subject under consideration were put in issue, and that plaintiffs did not offer any evidence to establish them.

The remaining averments of the complaint, so far as necessary to consider, are to the effect that the Board of Public Works is not a constitutional body; that provisions of the charter relative to public improvements are unconstitutional; that the assessments complained of were levied without regard to the question of benefits; that the natural slope of the land within the sewer district was sufficient to drain it; that property outside of the sewer district was benefited, but not assessed; that property within the district which should have been assessed is omitted; that the property of plaintiffs is not benefited to the extent of the assessments levied thereon; that the system is a public, and not a local, improvement; that the system was not properly constructed; that the law with respect to the letting of contracts was not complied with; and that items of expense were included which should not have been.

The constitutional questions raised have been decided adversely to the contention of counsel for plaintiffs in *City of Denver v. Dumars*, 33 Colo. 94, and *City of Denver v. Londoner, ibid*, 104. See, also, *Londoner v. City of Denver*, 210 U. S. 273; *Hildreth v. City of Longmont*, 47 Colo. 79. In *Spalding v. City of Denver*, 33 Colo 172, it was decided that the averments of the complaint above referred to did not entitle plaintiffs to the relief demanded, for the reasons given in the opinion in that case, and it is unnecessary to re-discuss them here.

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Some additional questions are urged by counsel for plaintiffs, but they are not involved, because not raised by the pleadings.

In brief, our conclusion is, that, eliminating the allegation that the charter was not constitutionally passed, the complaint wholly failed to state a cause of action but, as plaintiffs failed to prove this allegation, they failed to make a case entitling them to any relief whatever.

The judgment of the District Court is reversed, and the cause remanded for further appropriate proceedings.

Reversed and remanded.

Decision *en banc.*

Mr. JUSTICE HILL dissents.

Mr. JUSTICE MUSSER not participating.

[No. 5768.]

THE COLORADO & SOUTHERN RAILWAY COMPANY V. REYNOLDS.

1. MASTER AND SERVANT—*Contributory Negligence of Servant*—The promise of the master to correct a defective condition in the place of the servant's employment does not excuse the latter from the exercise of due care for his own safety, during the time allowed for reparation. If by reason of his own failure in that behalf, during such period, he receives an injury which would not have happened to him but for such neglect, he will not be allowed an action against the employer—(234).

Plaintiff was employed in defendant's pump-house. It was his duty, from time to time, to clean the air compressor. Around the air compressor was a narrow walk of cement, upon which oil escaping from the machinery would collect. There was no drip-pan to collect this oil, nor any guard-rail about the compressor. The presence of oil on the cement walk rendered the performance of the servant's duty a dangerous one. He knew the danger, appreciated it, and had repeatedly complained of it. The oil might easily be removed by sprinkling it with fine dust, and then sweeping the dust. Plaintiff, in order to clean the

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compressor, assumed a stooping posture close to it, with one foot on the cement walk so covered with oil, and the other upon the bed of cinders which composed the rest of the floor. In rising after the completion of his task his foot slipped upon the oily surface of the cement, and he fell upon the moving machinery, receiving injury. Held that his failure to first remove the oil was negligence contributing to his injury, and defeated his action; that during the process of wiping, if he had covered the oil with dust, oil would have settled upon the cement was held not to take the case out of the rule that for the servant to adopt the more dangerous of two methods open to him, in performing his work, is negligence—(234, 237).

2. NEGLIGENCE—*When for the Court*—Where the facts are not in dispute, and unquestionably disclose negligence, it is the duty of the court to so declare as a matter of law—(236).

3. INSTRUCTIONS—In an action by servant against master for an injury attributed to the defective conditions of the palce of employment, the complaint set up and relied upon a promise to repair. The answer denied the promise and alleged contributory negligence and assumption of risk by the servant. An instruction that the burden of proving the servant's assumption of risk was upon the master was held error as permitting a verdict for the plaintiff, even though the promise to repair had not been established—(237).

Appeal from Denver District Court—HON. P. L. PALMER, Judge.

Mr. E. E. WHITTED and R. H. WIDDICOMBE for appellant.

Mr. GUY LE ROY STEVICK and Mr. L. WARD BANNISTER for appellee.

Mr. JUSTICE GABBERT delivered the opinion of the court.

This is an appeal by defendant from a judgment rendered against it in the sum of fifteen hundred dollars in an action by the plaintiff, Reynolds, to recover damages sustained by the alleged negligence of the railroad company. The basis of plaintiff's claim as set out in his complaint is, that for several months prior to his injury he had been employed by defendant in its pump-house in the City of Denver; that it was his duty, one-half of

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each day, among other things, to operate, oil and clean an air compressor in the pump-house; that defendant negligently failed to maintain a guard-rail or other device about the compressor, so as to protect him from injury when operating or cleaning, or a drip-pan to catch and hold the oily matter escaping from the compressor, and collecting on the cement floor upon which it rested, which rendered the floor slippery; that in July of the year he was injured, he complained to the defendant of these conditions, and requested that they be remedied, at the same time informing the defendant that he was unwilling to remain in its employ unless the defects complained of were remedied; that defendant then and there promised to remedy them; that, relying on this promise, he remained in the employ of the defendant for the remainder of the month of July, and the whole of August succeeding; that during September he was employed by defendant in another pump-house, outside of the city; that on the first day of October he returned to his place of employment in the city; that shortly afterwards he complained of the conditions to which he had called attention in July; requested that they be remedied; stated that he was unwilling to continue in the service of defendant unless they were, and that the latter again promised to remedy them. He then alleges that, relying on the promise of defendant, he continued in its employ, and a few days later, and before defendant had allowed a reasonable time to elapse within which to remedy the conditions complained of, while cleaning and wiping the yoke of the compressor, he slipped upon oily matter which came from this piece of machinery, and fell into the compressor and was injured.

The answer denied the negligence charged, and the promise to repair; and as affirmative defenses, alleged contributory negligence and assumed risk on the part of the plaintiff.

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The replication denied all allegations of new matter set up in the answer.

It is to be observed that plaintiff, according to the averments of his complaint, had full knowledge of the defective conditions upon which he based the negligence of defendant, and appreciated the dangers to which he was thereby exposed; but that he sought to avoid the rule with respect to assumed risk by pleading a promise on the part of the defendant to repair. Notwithstanding this plea, and assuming that it was established by the evidence, did the testimony make a case entitling plaintiff to recover? A promise on the part of an employer to an employe to remedy a dangerous condition of which the employe has complained, does not excuse the employe from exercising due care to prevent injury to himself pending repairs.—*Miller v. Bullion-Beck C. M. Co.*, 18 Utah 358; *Gorman v. Des Moines Brick M. Co.*, 99 Iowa 259.

The important question, then, to determine, is whether or not the record discloses contributory negligence on the part of plaintiff, as claimed by the defendant. On this subject the rule is well settled, that where a plaintiff so far contributes to his injury by his own negligence or want of care and caution that but for such negligence or want or care and caution on his part, he would not have been injured, he is not entitled to recover.—*Colo. Central R. R. Co. v. Martin*, 7 Colo. 502; *Colo. Central R. R. Co. v. Holmes*, 5 Colo. 197.

The complaint and evidence show that plaintiff had full knowledge of the conditions with respect to the compressor, and, if they were dangerous, appreciated the dangers from that source. The floor of the pump-house was composed chiefly of cinders. Around the compressor was a cement strip of about eighteen inches in width. The compressor was about two feet in height. Considerable oil was used for lubricating this piece of machinery, a portion of which escaped when it was in motion, and was deposited on the cement strip. The

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room in which plaintiff was employed was well lighted. One of his duties was to operate the compressor, and clean it when necessary, as well as remove the oil on the cement strip when on duty. The oil deposited on the cement strip was usually cleaned up by sprinkling with fine dust, and then sweeping it off. This could be done with perfect safety when the compressor was in motion. Near the end of his shift, plaintiff, according to his own testimony, was engaged in cleaning the compressor, which was the usual time for doing that particular work. He noticed that oil was deposited on the cement strip. He assumed a stooping posture, with one foot on the cinder floor, and the other partly in the oil, and proceeded to wipe the compressor. On arising, his foot which was in the oil slipped, and he fell forward, his hand coming in contact with the moving parts of the compressor, which occasioned his injury.

The promise of defendant to repair did not relieve plaintiff from exercising due care; that is to say, such care as an ordinarily prudent person would exercise under similar circumstances. Did he do so? We think not. He was aware of the presence of the oil on the cement, and the danger to be apprehended on that account. Instead of removing or avoiding it, he placed one foot partly in the oil, and proceeded to wipe the machinery, when, by removing it first, the danger of slipping would have been entirely avoided. He voluntarily placed himself in a position which he knew to be dangerous, to wipe the machinery, instead of first removing the oil from the cement, which, according to his claim, would have removed the danger to which he was exposed, because of the want of a drip-pan. Under the circumstances disclosed in this case, where a person has a choice of two methods of performing his work, the one safe and the other dangerous, and is aware of this fact, it is his duty to choose the safe method. If he does not and chooses the method which necessarily exposes him to danger, which would have been avoided had he

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chosen the other, and is injured, he cannot recover for such injury.—*Dandis v. So. Pac. R. Co.*, 42 La. Ann. 686; *Cen. Ga. Ry. Co. v. Mosely*, 112 Ga. 914; *Morris v. Duluth S. S. & A. Ry. Co.*, 108 Fed. 747; 1 Labatt on Master & Servant, § 333, p. 839.

Had plaintiff first removed the oil, he would not have slipped; consequently, he would not have been injured, although the drip-pan and guard-rail which he says defendant promised to furnish had not been supplied. In brief, his own injury was occasioned entirely by the want of due prudence on his part. Regarding this there can be no doubt. The facts will not permit of any other conclusion. When the facts are not in dispute, and unquestionably disclose negligence, it is the duty of the court to so declare, as a matter of law.—*Colo. Central R. Co. v. Holmes, supra; Lord v. Pueblo S. & R. Co.*, 12 Colo. 390; *C., B. & Q. R. R. Co. v. McGraw*, 22 Colo. 363; *Jackson v. Crilly*, 16 Colo. 103.

We therefore conclude, from the record before us, that the negligence of plaintiff was the proximate cause of his injury.

Counsel for plaintiff contend that because he testified that there was more oil deposited on the cement strip than he anticipated, and that to first wipe the compressor was the more efficient way to clean it, for the reason that to throw dust on the oil on the cement would cause some to settle on the compressor before it was cleaned, and that during the process of wiping some oil would be deposited on the cement, that, therefore, he exercised a judgment and discretion as to the manner of doing his work which takes the case without the rule we have announced. We do not regard this contention as tenable. The oil on the cement could have been removed with waste. The danger plaintiff apprehended was from the oil, and the absence of a guard-rail. This had not been remedied by supplying

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a drip-pan to catch the oil, or the placing of the rail; and yet, with full knowledge of all these facts, and the dangers to which he was exposed, according to his own contention, we do not see how it is possible, from his own statements, to excuse him from voluntarily placing himself in a dangerous position, which could have been avoided by simply first removing the oil on the cement, instead of placing his foot partly in that substance, which, from its very nature, might cause him to slip—a condition which he says he had requested should be remedied by supplying a drip-pan.

But, even if a case had been made which justified its submission to the jury, the court erred in its instructions. The court instructed the jury that the burden of proving assumption of risk was upon the defendant. This was clearly error. According to the averments of the complaint, plaintiff appreciated the danger to which he was exposed. He pleaded a promise to repair, so as to avoid the assumption of risk on this score. If he did not establish this promise, then he could not recover, for the reason, as stated, that he assumed the risk of the danger to which he was exposed because of the absence of a drip-pan and guard rail. So that the case was submitted to the jury upon an issue not in the case, whereby they were permitted to find for the plaintiff, even though the promise to repair had not been established, upon the ground that defendant had not proved that plaintiff had assumed the risk of danger, and that defendant was negligent in failing, in the first instance, to equip the compressor with a drip-pan and guard rail.

The judgment of the district court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Reversed and remanded.

Decision *en banc.*

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CHIEF JUSTICE CAMPBELL concurs upon ground that the instruction was erroneous.

Mr. JUSTICE MUSSER concurs in the conclusion.

Mr. JUSTICE HILL dissents.

[No. 6088.]

THE NEW YORK LIFE INSURANCE COMPANY v. PIKE.

1. CORPORATIONS—*Residence*—A corporation organized under the laws of one state and doing business in another, by virtue of compliance with its laws, is not a resident of the latter state. —(243).

2. VENUE—*Change of Venue*—A corporation organized under the laws of New York was conducting business in Colorado, maintaining its principal office in the City of Denver. In an action instituted in another county, the process in which was served in Denver, it applied for a change of venue to the county of Denver, on the ground that its residence was in that county. *Held*, that under Rev. Code, Sec. 29, the motion was properly denied—(242-244).

3. LIFE INSURANCE—*Conditions*—A condition in an application for life insurance that the insurance shall not take effect unless the policy is delivered to the insured while he is in life and good health, is a valid condition—(244).

4. ——*Delivery of Policy*—A policy of life insurance may be delivered, in point of law, though it never comes to the hands of the insured.

Defendant was a life insurance company of the State of New York doing business in Colorado, with its principal office, in this state, in Denver. It was its custom to accept for the first premium, the promissory note of the applicant for insurance, and to deliver the policy without reference to the maturity or payment of the note, and to look to the local solicitor of the company for the payment of the first year's premium. Cartee, being informed of this custom applied for insurance upon his life, executing a promissory note, payable to the local solicitor, in three installments for the first year's premium. Cartee was a resident of Victor in Teller county. The local solicitor conforming to the rules of the company, transmitted the application with the note, to the Denver office. Thence the application was sent to the home office, and a policy, naming the wife of the applicant as beneficiary was issued thereon and sent to the

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Denver office, without instructions. So far all that was done was in conformity with the custom in like cases theretofore. But in this instance, the local solicitor being delinquent, the policy was detained in the Denver office for some days, and was then sent to a bank at Victor with instructions to return it if the first installment of the note should not be paid when due. Cartee died before the first installment of the premium matured. Up to the time of his mortal illness he had been in good health. The policy was then returned to the Denver office, and was never in fact delivered, nor ever came to the hands of the insured or the beneficiary. Held that in view of the invariable custom under which the company had conducted its business theretofore, that this custom was brought to the attention of Cartee, that his application was made with reference to it, that the application contained no provision that any premium must be paid before the policy took effect, or that the policy must actually come to the hands of the insured in his lifetime, the policy was, in contemplation of law, delivered when it was mailed from the home office of the company, that the agent at Denver received it charged with the duty to deliver it to the insured, that the contract was then complete, and the act of the agent in Denver in detaining it was without effect to impair it—(240, 244, 249).

The right of the beneficiary rested upon contract and not upon any estopped—(250).

Held further, that the return to the beneficiary of the premium note, with an endorsement, contrary to the fact, that the application had never been accepted without effect—(245).

5. ——*Amount of Premium*—The local solicitor is the agent of the insurer to fix the amount of the premium. His action binds the company—(250).

Appeal from Teller District Court—HON. LOUIS W. CUNNINGHAM, Judge.

Mr. CHARLES W. WATERMAN, Mr. WILLIAM A. JACKSON and Mr. JAMES H. MCINTOSH for appellant.

Mr. J. E. FERGUSON for appellee.

Mr. JUSTICE MUSSER delivered the opinion of the Court:

On September 24, 1904, a Mrs. Brown, the local solicitor of the appellant insurance company at Victor, in Teller County, solicited one John R. Cartee to take out a policy of life insurance. Mr. Cartee was averse

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to doing so, stating, as a reason, that he did not have the money with which to pay the premium. Mrs. Brown informed him that he could give his note for the first annual premium, as the company sometimes did business that way. Mr. Cartee said that if he could do that, he would take out a policy, whereupon the usual application was made out and signed by Mr. Cartee for a $2,000 policy, and he also signed and delivered to Mrs. Brown a note for the first annual premium, payable to her order in three installments, to-wit: $25.00 on November 10th, and $25.00 on December 10th, 1904, and $51.94 on January 10th, 1905. Mrs. Brown, as the rules of the company required, sent the application and note to the state branch office of the company at Denver. A memorandum was made of the note on the policy register at the Denver office, and the application was forwarded to the home office in New York. The note was retained at Denver. On this application, the company issued a policy, in which the wife of the insured was named as beneficiary, who is now Ida Pike and the appellee here. The policy was sent from New York to the Denver office with no instructions. Thus far the matter had been carried on precisely as had been the custom in like cases theretofore, wherein Mrs. Brown, who had been soliciting insurance for the company for several months, had thus taken notes for premiums. In every such instance before this one, when the Denver office received the policy, it was forwarded to Mrs. Brown and she would put it into the hands of the insured. The company held her responsible for the first premium. Thus the business was carried on with the full knowledge and consent of the office at Denver, and, as appears from the testimony of the cashier of the Denver office, with the knowledge and consent of the company at New York, for the cashier testified that Mrs. Brown was behind in the payment of premiums on outstanding policies, and the company had instructed him to hold Mrs.

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Brown's new business until she paid up her overdue premiums. This was, the cashier said, "as a sort of penalty, you might call it, in order to induce the agent to promptly pay up overdue business." In this instance, instead of doing as was customary, the cashier, in order to hold up her new business and penalize Mrs. Brown for her delinquencies in not paying up for some outstanding policies, and as she expressed it in her testimony, "to attack my commissions," held this policy for some time at Denver, and after its receipt and about October 14th, the cashier, retaining the policy, sent the note to Mrs. Brown for collection and remittance, though, by its terms, none of the installments were due. On October 22nd, the cashier sent the policy with another to a bank at Victor, with the following reference thereto in a letter enclosed with it:

"I also enclose policy No. 2,215,747 Cartee, $2000, total premium $102.26. The agent has the note which is dated September 24th due Nov. 10th, $25.00, Dec. 10th, $25.00 and Jan. 10th, $51.94. I have written the agent to return the note to me so that I can send it to you for collection. The discrepancy between the amount of the note and the total premium is an error on the part of the agent. Kindly try to collect this difference with the last installment of the note. I have noted the address of these two parties on the face of the policies.

In the event the first installments in the two cases are not paid when due, I will thank you to return the policies and notes to this office.

Kindly acknowledge receipt of these enclosures.

Yours truly,
W. A. WOOD,
Cashier."

He also sent a copy of the letter to Mrs. Brown and asked her to return the note to him, which she did not do. After receiving the information that the

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policy was sent to the bank, Mrs. Brown tried to find Mr. Cartee to inform him that the policy was at the bank, and to have him make arrangements to pay the note. She learned that he was out of town. He returned on the 30th of October, in apparently good health, having been absent since October 5th, and died on the 31st. Mrs. Cartee offered to pay Mrs. Brown the first instalment of the note when due on November 10th, and again on December 10th when the next instalment became due, but Mrs. Brown would not accept the money. After the death of Mr. Cartee, Mrs. Brown sent the note to the Denver office, and on November 2d, it was sent by the cashier to the home office of the company in New York. The Victor bank returned the policy to the Denver office. Afterwards, the note was again sent to Mrs. Brown, who was instructed to call upon an attorney, and, upon his dictation, indorsed thereon the following:

"The application for insurance in connection with which this note was taken not having been accepted, the consideration for this note has failed and the note is returned for cancellation.

MRS. I. BROWN."

The note was left with the attorney, and on February 5th was returned so indorsed to Mrs. Cartee. This was after she had begun an action for the insurance, which action was dismissed, and this action brought in the district court of Teller county to recover on the policy. From a judgment in her favor, the company has appealed to this court.

In due time, the company filed a motion for a change of venue from the district court of Teller county to the district court of the city and county of Denver, for the alleged reason that the defendant was a resident of the city and county of Denver, having its principal place of business there, and that the summons was served there, and, in support of the motion,

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filed an affidavit of the director of the agency at Denver, in which it was stated that the company was a corporation organized under the laws of the state of New York, for the purpose of carrying on the life insurance business, and, as such, was authorized by reason of a full compliance with the laws of the state of Colorado to carry on its business in this state, and for that purpose had its principal office and place of business in the city and county of Denver, and was a resident, for the purpose of carrying on its business, in said county, and that the summons was served upon the agent in the city of Denver. The question of the sufficiency of the affidavit, because it fails to negative certain facts, the existence of which would confer jurisdiction on the district court of Teller county, is left out of view.

Section 29, Rev. Code, relating to the place of trial of actions, among other things, provides:

"Or if the defendant be a non-resident of this state, the same (the action) may be tried in any county in which the defendant may be found in this state or in the county designated in the complaint."

The authorities, both court and text writers, announce, as settled doctrine, that a corporation organized under the laws of one state is a resident of the state under whose laws it was created; that it can not be a resident of any other state, and, though such a corporation be permitted by another state, upon compliance with its laws, to carry on its business there, such permission and compliance does not make it a resident of such other state.—*Cook v. Hager*, 3 Colo. 386; *Shaw v. Quincy M. C.*, 145 U. S. 444; *Boston I. Co. v. Boston*, 158 Mass. 461; *Beraner, etc., Co. v. Dreyfus*, 172 Mass. 154; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Boyer v. N. P. Ry. Co.*, 8 Idaho 74; 1 Thompson on Cor. (2d ed.) § 490 *et seq.*; 1 Cook on Cor. (6th ed.) § 1; 1 Clark & Marshall Private Cor. § 114.

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It follows that this defendant was a resident of the state of New York, in which it was created, and a non-resident of the state of Colorado, within the meaning of the language quoted above from sec. 29 of the Code. This being so, the action was triable in the county designated in the complaint, and the motion for a change of venue was properly overruled. To hold otherwise would be to engraft upon the statute an exception, which is wholly foreign to its plain terms, and would be only an amendment thereof.

In the application signed by Mr. Cartee, there was a provision that the insurance thereby applied for should not take effect unless the policy was delivered to him during his lifetime and good health. The company now asserts that, "the agreement of the parties that the insurance should not take effect unless the policy was delivered to Cartee during his lifetime and good health was an agreement they had a right to make, and which the court ought to respect." In this assertion, the company is right. The principal contention of the company is, that the policy was not delivered in the lifetime of the insured. The record discloses that the insured remained in good health until the time of his death. The question, therefore, is, was or was not the policy delivered, in contemplation of law, to the insured during his lifetime? If it was, the judgment is right. If it was not, the judgment is wrong. The application did not provide that the policy must be actually received by or given into the hands of the insured in his lifetime, nor did it provide that any premium had to be actually paid before the policy was in effect. Theretofore, policies, in like cases, had been actually put into the hands of the insured by the local solicitor without reference to the payment of the first premium, other than at the time specified in the notes given by the insured. This was fully understood, and in fact brought about by the local

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solicitor and the state agent of the company. It also appears that the company at New York, not only knew that notes were being taken for first premiums, but actually authorized the taking thereof, for the cashier testified that it was a rule of the company that all notes taken for premiums had to be sent to the Denver office, with the applications, and a record thereof made in the books.

The case of *Kimbro v. The N. Y. Life Ins. Co.*, 134 Iowa 84, is almost identical with the case at bar, so far as the notes are concerned. In that case, there was a dispute as to whether the defendant's agents were authorized to accept notes for premiums. In this case, there is no doubt on that question, for the rule of the company was, that notes taken should be forwarded to the Denver agency with the application. There, as here, the notes were sent by the solicitor to the superior officer or agent to whom he was immediately responsible. There, as here, the notes were made payable to the local solicitor. There, as here, the company continued to hold these notes until it discovered that payment for loss was impending, when the notes were returned to the local solicitor for indorsement, and were indorsed in words of substantially the same import as the indorsement upon the note in the present case. There, as here, the agent was held responsible for the premiums represented by the notes, though in the Iowa case, it appears that the local agents would charge themselves in their agency accounts. Whether Mrs. Brown charged herself or not, in this case, the record does not disclose, but both Mrs. Brown and the cashier testified that she was responsible for the premiums, and the home office held her responsible for them when overdue. The Iowa court held that the facts in that case were evidence that the notes were authorized by the company, and said:

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"Such a transaction is a payment of the premium as between the assured and the company. The giving of the note instead of cash in advance by the applicant will not invalidate the insurance, if the contract be otherwise complete."

The facts in this case are stronger in support of such a conclusion than in the Iowa case. Here it was with the direct authorization of the company that the note was taken, and the invariable custom, when such notes were taken and the applications accepted, to issue the policies, send them to the insured, through Mrs. Brown, and look to her for the premium. When the notes became overdue, they did not look to or worry the policy holders, if they could have done such a thing, but looked to Mrs. Brown for payment, and endeavored to collect from here. At the same time, she was permitted to continue in the same way to induce persons to make applications for insurance and sign notes for the first premiums, and the company, notwithstanding the non-payment of past premiums for outstanding policies, would accept these new applications and mail policies for Mrs. Brown to put into the hands of the insured.

The circumstances under which the indorsement was made under the instructions of the company itself. was made under the instruction of the company itself. That indorsement does not say that the consideration for the note failed, because the policy was not delivered, nor that it was cancelled because the policy was not delivered, but the indorsement says that the consideration for the note failed because the application was not accepted. This record, however, shows that the application was accepted. The policy was issued and sent to Denver in the usual course, when it was diverted from that course and sent to a bank, not because the application had not been accepted, but because Mrs. Brown was behind in the payment of other premiums. If the consideration for the note failed, for the reason

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alleged in the indorsement, it had failed before the policy was sent to Denver, and the Denver office was guilty of trying to collect the premium on an application that had been rejected. The New York office, instead of notifying the Denver office that the application had not been accepted, sent the policy in the usual way without instructions. The reason given in the indorsement for the cancellation of the note did not exist, and the consideration for which it was alleged the note was given did not fail.

In *Godfrey v. The N. Y. Life Ins. Co.*, 70 Minn. 224, Godfrey made an application to one of defendant's agents for life insurance, and delivered to the agent her promissory note for the amount of the first premium, payable to the agent. The agent never accounted to the company for the note, but transferred it to Sanford, who was a good faith purchaser for value. The policy, though prepared and executed by the company, was afterwards abandoned by both parties, and Godfrey, who had to pay the note to Sanford, brought suit against the insurance company to recover the amount of the note. It did not appear in that case as directly as in this case that the agent had authority to accept the note. The local agent, however, had been in the habit of taking such notes and discounting them at a certain bank. This was known to the general agent of the company, and it was held, that under the circumstances, notwithstanding written instructions to the contrary, the insurance company was bound by the act of the agent in accepting the note, and a judgment for the plaintiff, against the company, for the amount of the note, was affirmed.

In *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, an application was made to a local solicitor for insurance on December 19, 1904, and, at the same time, the applicant executed and delivered to the solicitor two promissory notes for the first premium, payable to the

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solicitor, one in one month and the other in six months from date. The application was sent to the state agency in Minneapolis and at once forwarded to the home office in New Jersey. On December 23, 1904, the company executed a policy and mailed it to the state agency at Minneapolis for delivery to the insured. The state agency received it on December 26th. On December 24th, the insured died. On December 26th, the state agency learned of his death and returned the policy to New Jersey. On the same day, the solicitor delivered the two notes to the state agency, who, until then, had no knowledge of their execution. They marked the notes void and cancelled, and forwarded them on January 12th to the plaintiff. No attempt was made to collect the notes, and nothing was ever paid on them. The court said the only serious question in the case was whether the premium was paid by the delivery of the notes in question. The application, which was forwarded to the company, stated that $61.32 had been paid in advance on account. The question was, whether the giving of the notes constituted a payment in advance on account, as stated in the application. The authority of the agent to take the notes was not as clear as in this case. The court said that if the delivery of the promissory notes to the agent constituted payment of the first premium, the policy was in force when the insured died, and the plaintiff was entitled to recover. In that case, most of the opinion is devoted to a discussion of the authority of the local solicitor to take the notes. There was no such direct authority as in this case. After a lengthy discussion, the court concluded that the local agent had authority to take the notes, and that, therefore, they constituted payment of the first premium. The lower court had found that the first annual premium had not been paid; that the policy was never delivered, and rendered judgment for the defendant company. The Supreme Court reversed this, and directed judgment for plaintiff on the stipulated facts.

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It follows from these authorities that the first year's premium was paid by the note given by Mr. Cartee. Under these circumstances, the mailing of the policy by the company, in the usual course, constituted a delivery thereof.—*Kilborn v. Prudential Ins. Co., supro; N. Y. Life Ins. Co. v. Babcock*, 104 Ga. 67; *Kimbro v. N. Y. Life Ins. Co., supra.*

The cashier at Denver, by sending the note to a bank, with instructions that implied payment before delivery, could not affect the contract already made. The contract was complete when the application was accepted and the acceptance signified by mailing the policy. *Kilborn v. Prudential Ins. Co., supra.* The act of the company in transmitting the policy must be construed in the light of the manner in which the company did business before in like cases. Mr. Cartee was induced to sign the application and make and deliver his note by being told, by the agent, that the company did business that way, and he certainly proposed to do business with the company as the company was accustomed to do business, in like cases. The agent at Denver received the policy, charged with the duty of transmitting it to the local solicitor to be put into the hands of the insured, for in that way the business had been done in every instance before. It was out of the power of any agent of the company, or even of the company itself, without the consent of the insured, to change a contract once made, and impose upon it new conditions. It certainly would be unjust for the insured to suffer because of a scramble between the company and the soliciting agent to get first hands on the premium. There was a difference of thirty-two cents between the amount of the note given and the premium mentioned in the policy. The cashier's letter to the bank shows that he was not very insistent about this. A difference between the notes and the premium existed in the case

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of *Kilborn v. The Prudential Ins. Co., supra,* and the court dismissed it as follows:

"The fact that the face of the notes given to Knudtson (the local agent) amounted to slightly less than the sum due for the first premium is not important. It will be presumed that the difference was waived."

However, we prefer to put it on principle and say that the contract made between the company and Cartee fixed the first premium at the amount of the note. The amount of the premium was not mentioned in the application. The local solicitor had authority to state to the applicant the amount of the first premium. The applicant did not know what the amount was and could learn it only from the solicitor. She was the mouthpiece of the company to inform him. It was her duty to do this, and the company intrusted her with this duty. Her statement in that behalf was the statement of the company. The mind of the local agent, which for that purpose was the mind of the company, met the mind of Mr. Cartee in fixing the amount of the first premium at the amount specified in the note.

Something is said in the company's brief relative to a clause in the application, that anything paid in advance, on account of the premium, shall be binding on the company only, in accordance with the agent's or cashier's receipt therefor, on the company's authorized form. The authorized form of receipt was set out on the application. This form itself recited that it would not be valid if issued after June 30th, 1904. How this could apply to an application made in September, 1904, is incomprehensible. This clause is so manifestly a nullity that it forms no part of the application.

Something is also said relative to the question of estoppel, and that estoppel was not pleaded. As has been seen, the rights of the plaintiff do not rest at all upon estoppel. The rights of the plaintiff and the lia-

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bility of the company rest entirely upon a plain contract in which estoppel plays no part.

As we are unable to discover any error against the company, the judgment is affirmed.

Judgment affirmed.

Decision *en banc.*

Mr. JUSTICE HILL not participating.

Decided July 3, A. D. 1911; rehearing denied October 2, A. D. 1911.

[No. 6144.]

DENVER CITY TRAMWAY COMPANY VS. BRUMLEY.

1. EVIDENCE—*Res Gestae*, may be broadly defined as something incidental to the main fact and explanatory of it, including acts and words so closely connected with it as to constitute part of it, and without a knowledge of which the main fact may not be properly understood—events themselves speaking through the instinctive acts and words of the participants in the transaction, growing out of the main facts, and contemporaneous with it. —(254).

The declaration of the conductor of a street car made in the act of assisting to her feet a lady who had just been thrown from his car, that "the accident was not due to his fault, that the motorman started without a signal"; and his question to another passenger "Did you notice that the car started before I rang?" were held clearly admissible as verbal acts, part of the transaction, and serving to illustrate, explain and interpret it—(258).

2. APPEALS—*Harmless Error*—The refusal of an instruction calling upon the jury to bear in mind, in considering the evidence of the plaintiff, her direct interest in the result of the action, is harmless, where a general instruction is given requiring that, as to all witnesses, the jury should among other things, take into account their interest, if any, in the result of the suit —(259).

Where the charge of the court as a whole is comprehensive, correct and fair, possible technical objections to segregated portions of it will not reverse—(259).

3. VERDICT—*on Conflicting Evidence*—Is conclusive where there is sufficient to support it—(260).

Appeal from Denver District Court—HON. SAMUEL L. CARPENTER, Judge.

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Mr. GERALD HUGHES and Mr. HOWARD S. ROBERTSON for appellant.

Mr. THOMAS B. STUART and Mr. CHARLES A. MURRAY for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court.

Plaintiff's complaint alleged in substance that, while attempting to alight from one of defendant's cars, at the intersection of Fifteenth Street and Cleveland Place, after the car had been brought to a stop, but before she had an opportunity to completely get off, the car was negligently and carelessly put in motion and moved forward, and by reason thereof she was thrown to the pavement, and the bones of her left arm, wrist and hand fractured and broken in two or more places, her left shoulder sprained, bruised and disabled, her back and hip bruised and wounded and her nervous system greatly shocked. To reimburse her for the damage thus sustained she prayed judgment in the sum of $10,000.00.

The defendant for answer denied these allegations, and set up the defense of contributory negligence, alleging that the plaintiff attempted to alight from the car before the same came to a stop, and before it was in the act of even slowing up, and also that in alighting from the car she stepped off with her face to the rear. The plaintiff had judgment for $1,520.00, and the defendant brings the case here to review that judgment on appeal.

The first error assigned goes to the admission by the court, as is alleged, of improper evidence on behalf of plaintiff, and the rejection of proper evidence offered by defendant.

The main contention under this head is that the court permitted the plaintiff, in order to sustain the allegations of her complaint to testify as follows:

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"Q. Well, now, what if anything further was said by the conductor in that immediate connection?

A. When he got me on my feet and he was still holding onto me, I said, 'Oh, conductor, why did you throw me?' and he let go of me then and turned and said to some of these men standing there and he said, 'I have been on the road so many years and this is my third accident,' and he said, 'Two of them have occurred since noon today,' but he says, 'This one wasn't my fault, the motorman started the car without a signal.'

Q. State how soon after you were thrown on the pavement did this conductor make this remark which you have last stated?

A. Well, it was within the time I have been telling you; I think it couldn't have been over two minutes after I was thrown from the car when he said it."

Upon motion, all of the answer having reference to other accidents and to the experience of the conductor was stricken by the court and withdrawn from the jury. That portion of the answer wherein the conductor said: "This one wasn't my fault, the motorman started the car without a signal," was premitted to go to the jury as part of the *res gestae*. It is earnestly contended that this evidence is incompetent, and that it was reversible error to permit it to go to and be considered by the jury, upon any theory whatever. Also answers given to questions propounded to Dr. J. B. Kinley, one of plaintiff's witnesses, were objected and excepted to, as follows:

"Q. At that time, (referring to the time the conductor was lifting the plaintiff to her feet) Doctor, did you hear the conductor say anything in regard to the accident?

A. Yes, sir.

Q. You may state what he said.

A. He said, 'Did you notice that the car started before I rang?' "

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Res gestae may be broadly defined as matter incidental to a main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of it, and without a knowledge of which the main fact might not be properly understood. They are the events themselves speaking through the instinctive words and acts of participants; the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character.

The general rule, upon the question of the admissibility of testimony as part of the *res gestae*, of such declarations or statements as are here objected to, is well stated in *Louisville, etc., Ry. Co. v. Buck*, 116 Ind. 566, as follows:

"It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestae*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself."

In *Lund v. Tyngsborough*, 9 *Cush.*, page 42, speaking of statements such as are now under consideration, the court said:

"Such a declaration derives credit and importance, as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or

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transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it."

In *Rockwell v. Taylor*, 41 Conn. 55, the rule was laid down thus:

"To make declarations admissible on this ground, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain and to so harmonize with them as to constitute a single transaction."

In *Tilson v. Tirwilliger*, 56 N. Y. 273, JUDGE FOLGER laid down the rule as to *res gestae* declarations in this manner:

"To be a part of the *res gestae* they must be made at the time of the act done, which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction."

In *Missouri Pacific Rwy. Co. v. Baier*, 37 Neb. 244, it is said:

"The consensus of the authorities seem to be, that a declaration to be a part of the *res gestae* need not be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction."

New York & Colo. M. S. & Co. v. Rogers, reported at page 6 of 11 Colorado Reports, is a case where the declarations of the defendant's foreman, made some thirty or sixty minutes after the accident, as to the un-

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safe condition of a certain appliance, were held competent. The court, speaking through Mr. JUSTICE HELM, said:

"The foreman was defendant's agent in charge of the mine, and was upon the ground when the plaintiff was injured. He proceeded at once to the shaft,' and directed the employes to fix the appliance in question. His remark was called forth by the accident, and was uttered while giving instructions with reference to that which plaintiff claims was its cause. * * * The declaration in question was not an idle statement, wholly disconnected from the principal fact. It tended to throw light upon the circumstances attending the injury, including the cause thereof, and to illustrate its character. We shall hold that there was no abuse of the 'sound discretion' lodged with the court in admitting it as part of the *res gestae.*"

In *D. & R. G. R. R. Co. v. Spencer,* 25 Colo. 9, upon the same line of reasoning, statements of decedent, although self-serving, and made several days before the accident, were held admissible as illustrative of his act in afterward going to the place of the accident, as being, in the language of Wharton, "part of the immediate preparation for, or emanations of, such act; and not produced by the calculated policy of the actors."

The opinion in *Pueblo Building Co. v. Klein,* 5 Colo. App. 348, although strongly relied upon by the defendant as an authority for the exclusion of this evidence, upon full consideration and analysis, seems rather to support the propriety of its admission. In that case it is said:

"The general doctrine applicable to the question may be stated thus: The declaration offered in evidence must be either contemporaneous with the principal fact, or its natural and spontaneous outgrowth. It must be the instinctive, unmeditated utterance of the party while the impression produced by the event has

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full possession of his mind. The connection between the statement and the fact must be such that the one is the evident interpreter of the other. Their relations to each other must be that of immediate cause and effect. When the two are thus connected, it does not matter that there is an appreciable lapse of time between them. Notwithstanding such lapse, the one is a continuation of the other, and both are parts of one transaction."

No more perfect, complete or accurate description of the situation before us can be given than that found in the language just quoted from that opinion, in which it is further said:

"In this case no connection whatever appears between the fall of the child from the elevator and the words spoken by the elevator boy. If, when the child fell out, he had immediately lowered the elevator to the basement, against the floor of which she struck, any exclamation he might have made upon first coming in sight of her body, and realizing the fatal result of the accident, would perhaps be considered as part of the transaction, and therefore competent."

In the case of *Trumbull, Receiver, v. Donahue*, 18 Colo. App. 460, a suit for damage for injury to a man's hand, crushed in the closing door of a car, the declaration of the brakeman, made directly after the accident, to the conductor, "Look what this door has done to this man's hand." and his further statement to the plaintiff, "Turning that curve throwed your hand off," were both held admissible under the authority of *Building Company v. Klein, supra*, as being the natural and spontaneous outcome of the principal fact and constituting an entire transaction.

If the declarations and statements of the conductor in the case at bar were not the natural and spontaneous outcome of the main or principal fact, forming a material part of it, and competent as original evidence in the nature of *res gestae*, then there can be no such

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thing. They were made at the very time, and in the very presence, of the accident, while the conductor was still in the discharge of his duties in that behalf, lending aid to the victim of the unfortunate happening. They grew directly out of and supplemented the main fact; indeed, they were the legitimate offspring of it, part and parcel of the transaction itself. They were clearly verbal acts, serving to illustrate, explain and interpret the transaction. The situation under which they were made exclude the idea of design or deliberation, and stamp them with hte insigna of truth. Under practically all of the authorities, declarations and statements of this sort, made under such circumstances and conditions, are admissible in evidence. The fact that they may have been brought forth by an exclamation on the part of the plaintiff, renders them none the less voluntary, natural and spontaneous, and they are therefore none the less admissible because of that fact.

Under the head of improper evidence admitted and proper evidence excluded there are no other matters urged which are regarded as being sufficiently important to require discussion.

The defendant requested the court to give instruction number 9, as follows:

"The court instructs the jury that in Colorado, by statute, the plaintiff is allowed to testify in her behalf, but in considering her evidence you are to bear in mind the fact that she is the plaintiff and directly interested in the result of the action."

And the court declined to do so. Of this refusal complaint is made by the defendant. It is unnecessary to consider or pass upon the question whether such refusal would have been error had no other equivalent instruction been given, but as this point was clearly covered by what the court said, first, in instruction number 5, wherein it advised the jury that the weight of evidence was, among other things, to be determined by

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the motives of the witnesses in testifying, as shown upon the stand, and by their interest, if any, in the result of the suit; and again, in instruction number 13, upon the credibility of witnesses, wherein the jury, among other things, were told to take into consideration the bias of the witnesses, their prejudice or interest, if any had been shown, in determining their credibility and the weight to be given their testimony, this instruction was properly refused. No one doubts that the jury knew that the plaintiff was the plaintiff, and also exactly what interest she had in the suit, and they were fully instructed to consider such interest, that is, the interest of all witnesses, in determining the weight and credibility to be given their respective testimony. It could have added nothing whatever to the cause of the defendant to have had this instruction given. There was no error in refusing it, since what it contained had been substantially incorporated in other instructions given. *Tanner v. Harper*, 32 Colo. 156; *Thompson v. People*, 26 Colo. 496; and *Denver City Tramway Company v. Cowan*, decided at the April, 1911, term.

Much argument is offered against certain instructions given, and it may be that, seggregated from the charge as a whole, purely technical objections might be successfully urged to some one or more of them. Almost no case of any considerable importance has ever been tried in which complaint might not, with equal force, have been made of isolated instructions, considered only disconnectedly. But the charge, as a whole, is comprehensive and full; it correctly states the law of the case and treats the defendant absolutely fairly; there is nothing whatever in the instructions of which it can justly and properly complain.

It is finaly urged and argued at great length that the verdict of the jury is contrary to the weight of the testimony. This argument is made in face of the fact that there are decisions by this court, almost without

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number, which have announced the doctrine, that questions of fact upon conflicting evidence are to be determined by a jury, and not by an appellate court, and that the findings of a jury thereon are conclusive and will not be disturbed on review. Moreover, in this particular case, despite the exhaustive and persuasive argument of counsel to the contrary, we are, after a full and careful inspection of the entire record, persuaded to the view, not only that there is ample testimony to support the verdict of the jury, but that possibly the preponderance thereof is that way. So that there appearing to have been, in all respects, a full, fair and impartial trial, with, under the facts, an unusually modest and moderate money award, the judgment should be affirmed.

Judgment affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

[No. 6194.]

THE PEOPLE VS. HARD LAND COMPANY.

1. NOTICE—*False but Not Misleading*—A statement in the advertisement of the sale of public lands which though false can mislead no one, will be disregarded—(267).

2. EVIDENCE—*Presumptions*—It is presumed until the contrary appears that public officers acting officially perform their duties and observe the law—(267, 268).

3. STATE LAND BOARD—*Evidence of Their Action*—The action of the state land board in directing a sale of public school lands to be made at a place other than the state capital, as permitted by Secs. 12, 15 of the Act of April 2, 1887 (Laws 1887, 328), need not be made matter of record—(266).

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The fact that the board approved the sale, though made at a distance from the state capital, and issued a certificate of purchase thereon, was held conclusive that the sale was directed to be made as it was in fact made—(266).

4. ——*Sale of School Lands by County Superintendent*—The sale of school lands, ordered by the State Board of Land Commissioners, and advertised and made by the County Superintendent of Schools, merely as auctioneer, and professing to act for and by authority of the state board, was sustained, no fraud, collusion or sacrifice of the land appearing, though, so far as appeared, no member of the board was present thereat—(268).

5. ——*Sale of Irregular Parcels*—The provision of the statute, Act of April 2, 1887 (Laws 1887, 328, Sec. 14) that all sales of state lands shall be made "in legal subdivisions of not more than 160 acres" has no application to the sale of an irregular parcel lying in two different subdivisions, not exceeding five acres in area—(268, 269).

6. *Subdivision Into Lots and Blocks*—Sec. 13 of the Statute cited is permissive merely—(268).

7. ——*Sale Without Survey*—A state patent will not be annulled merely because the sale of the lands was made without a survey, where there is no evidence that a survey was necessary, or that the area was greater than that for which it was sold—(269).

The State Board should survey the public lands before the sale thereof, wherever this is necessary; but they have a discretion in the premises—(269).

8. EVIDENCE—*Action of Executive Boards*—Where no statute requires it the action of a board need not be evidenced by record —(266).

9. JUDICIAL ACTION—*Grounds Of*—A court can act only upon what is alleged and proven. They are not at liberty to go out of the record and indulge in speculation—(269, 270).

Error to Pueblo District Court—HON. JOHN H. VOORHEES, Judge.

HON. WILLIAM H. DICKSON, attorney general, HON. BENJAMIN GRIFFITH, attorney general, Mr. CHARLES L. DICKERSON, Mr. ROY E. DICKERSON and Mr. GEO. C. MANLEY for the people.

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Messrs. MCCORKLE & MCCORKLE and Mr. JAMES H. TELLER for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court.

On July 9, 1887, G. H. Hard purchased from the state, at public auction, certain school land in Pueblo County, consisting of five acres, more or less, within certain defined boundaries, for $7,950. A certificate of purchase was issued, entitling the purchaser to a patent for the land upon payment of a balance of the purchase money with interest. The payment was made, and on February 21, 1899, a patent for the land was issued by the state. The total amount of purchase money and interest paid by the purchaser was $8,673.45. In 1900, the defendant in error became the owner of the land, deraigning title from the patentee. In 1905, an action was commenced by the state to cancel the patent and recover the land. The relief sought was denied, and the matter is before this court on error.

An application for the sale of the land was made to the State Board of Land Commissioners, and, at a meeting of the board, held on May 26, 1887, the sale was ordered at a minimum price of $150.00 an acre. It does not appear that any order was made by the board, while in session, and entered in its minutes that the sale should be made at Pueblo. The Register of the board, at the time of the sale, testified ina deposition taken in 1906, when he was 77 years old, and 19 years after the events concerning which he was testifying had transpired, and stated that he did not recall that a specific order was made at the time the board was in session, indicating either the place of sale or the person to conduct it, but said that to the best of his recollection, after the sale was ordered, one of the members of the board suggested that it would be advantageous to the state to make the sale in Pueblo, and

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that he, the register, thereupon submitted this suggestion to each of the members of the board, and each assented thereto and directed that the sale be made in Pueblo by the County Superintendent of Schools. Thereupon, the register sent an advertisement of the sale to the County Superintendent, directing him to have it published. The superintendent, for the board, caused the advertisement to be published in a proper paper for a sufficient length of time. In this notice of sale, the land was described as one parcel of about five acres, comprising all the portions of two certain eighty acre tracts, lying within certain defined boundaries. The advertisement was made upon and copied into the newspaper from a printed blank designated for that purpose, and was, in all respects, regular, except that it contained the following clause which obviously should have been, but was not, erased:

"The parcels will be sold in the above order and each tract will be sold as forty acres—be the same more or less."

This clause is so out of place in the advertisement, and so obviously without meaning, that it could deceive no one and have no effect, and no further mention will be made of it. The notice was signed by the County Superintendent for the board, and, on its face, it purported that he was acting for the board. At the time and place designated in the notice, the County Superintendent, for the board, offered the land for sale at public auction, and struck it off to Hard, who was the highest bidder. It appears that the bidding was spirited among 15 or 20 bidders. Thereafter, the superintendent made report of the sale to the board, and the latter issued a certificate of purchase upon the sale so made and reported. On February 21, 1889, at a meeting of the board, it appeared that all the deferred payments were made, and the patent was ordered issued. The cause of action set forth in the ab-

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stract, upon which the plaintiff in error relies, contains no allegation, nor was there any evidence of any fraud or collusion in the sale of this land, or that the state received less than the land was worth, or that the parcel sold contained more than about five acres, or that the state was, in any way, defrauded. Nothing appears in the record to indicate that the patent issued for the land was not good on its face. The state began an action for the cancellation of this patent about 16 years after it was issued, and about 18 years after the sale, and now, without any allegation, proof or claim of fraud or collusion, or that the state was defrauded, or that it did not receive what the land was worth, it is asking this court to reverse the lower court and to say that the patent, the conveyances to the defendant in error, and all the intermediate conveyances be cancelled. The defendant in error claims to be a remote grantee of the patentee, claiming under a patent, good on its face, without notice of any defects in the sale, and that this is a perfect defense. It also claims that even if it is regarded in the same light as the patentee, it is presumed that the public officers properly performed their duties until the contrary is proven; that in order to annul a patent like the one under consideration and destroy the title claimed under it, the facts calling for such action must appear from clear, convincing and unambiguous evidence: that there is not sufficient evidence in this case to overcome the strong presumptions presented by the patent itself, and that owing to this lack of evidence, as well as the want of proper allegations in the complaint, the patent itself affords sufficient reason to sustain the judgment of the court below. These claims of the defendant in error may possess force. They will not be discussed because it is not necessary to discuss them. The reasons, given by plaintiff in error, why the patent should be annulled are not sufficient, and a discussion of these reasons is

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all that is necessary for the disposition of this matter.

Under section 9 of article IX of the constitution, the State Board of Land Commissioners had the direction, control and disposition of public lands of the state, under such regulations as were prescribed by law, and, by section 10 of article IX is was made the duty of the board to provide for the sale or other disposition of all lands theretofore, or which might thereafter be, granted to the state by the general government, under such regulations as may be prescribed by law. The regulations prescribed by law for the disposition of the lands of the state, at the time this sale was made, were contained in an act of the General Assembly, approved April 2, 1887, and may be found on pp. 328-338 of the session laws of that year. There is no question but that the board had full power and authority to sell the land described in the patent, at a sale made in substantial conformity with the statutory requirements. The plaintiff in error, in its brief, claims that the statutory requirements were disregarded in five different instances in the sale of this land, and, for these reasons, the patent is void and should be set aside. Section 12 of the act provided that all lands granted by Congress to the state for the support of schools were withdrawn from the market, and the sale thereof prohibited. It was provided, however, in the same section that any parcel of such land might be sold when the board was of the opinion that the best interests of the school fund would be served by offering such parcel for sale, and further provided that the land should be sold only at public auction and at not less than $3.50 per acre, and should be offered for sale, the same as other state lands.

1. The plaintiff in error first argues that because no order was ever made or entered of record by the board while in session, directing the sale of the land to be made at Pueblo, the sale thereof was not legally made. Section 15 of the Act provides that "all sales

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of the state land shall be held at the state capital unless otherwise directed by the State Board of Land Commissioners." The place of sale was thus left to the discretion of the board. The statute did not make it the imperative duty of the board to enter an order, directing a sale elsewhere than at the capital, if it was decided to sell it elsewhere. The statute prescribed that the board could sell any of the school lands only when it was of the opinion that the best interests of the school fund would be served thereby. In *Routt v. The Greenwood Cemetery Co.*, 18 Colo. 132, it was said that even if the determination of the service of the best interests of the school fund was prescribed as a condition precedent to a sale, the proof of the fact of such determination was not required to be shown of record, but that it might be shown by evidence *aliunde*, and that even without such showing it was to be presumed that public officers performed their duties until the contrary appears. So here, if it was necessary as a condition precedent that the board should determine that it was their discretion that the sale should be held in a place other than the state capital, the proof of that fact was not required to be shown by the record. What stronger or clearer proof could there be of the fact that it was the discretion of the board to sell the land at Pueblo than the fact that they sold it there? Not only did they sell it there, but the sale was reported to the board as made there, and the board approved and acted upon the sale and issued its certificate of purchase. How can it be said that the board did all these things concerning the sale at Pueblo, and, at the same time, say that the board had not exercised its discretion to sell the land there? Did the board do all these things concerning a sale at one place when it was their discretion that it be sold at another? It thus conclusively appears that the board exercised its discretion to sell the land where it was sold, and when it did so exercise its

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discretion it must of necessity have thereby directed that the sale be made where they decided it should be made and where it was made. The only logical conclusion that can be reached is, that under the circumstances of this case, the sale was directed by the board to be made at Pueblo. Any other conclusion would lead to the result that the board did something and approved something that they did not direct.

2. The next reason, given by plaintiff in error, why this patent should be avoided is that the County Superintendent had no authority to advertise, hold or make the sale. When the evidence is analyzed, it is found that he did not advertise the sale except as one who was asked to insert an advertisement in a newspaper for another may be said to advertise it, nor did he hold or make the sale except as an auctioneer may be said to hold or make a sale. If the County Superintendent, in his own name, had advertised, held and made the sale, issued the certificate of purchase and the patent, the argument of the plaintiff in error would be more applicable than it is under the facts presented. That would be the attempted exercise of a power not possessed. True, the notice said that the superintendent would sell the land at public auction, at a time and place specified, but it was professed in the notice that it was for the State Board, thus plainly putting the superintendent in the capacity of the auctioneer of the sale. There is nothing in the act which says that the Governor, Superintendent of Public Instruction, Secretary of State, or Attorney General, who constituted the board, or the register, who was in the nature of its clerk, should act as auctioneer, either collectively or individually. If their presence was required at the place of sale, there is nothing in this record to show that they were not there, unless it be taken that no mention of their presence is conclusive proof of their absence. It is presumed, as was said in the case in the 18th

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Colo., that this board performed its duties in conformity with the law, until it is shown that they did not, and it is not shown that they did not perform their duties in and about the conduct of this sale. The County Superintendent inserted the advertisement at the direction of and for the board, and he sold the land, as the auctioneer, at the direction ofand for the board. There is no proof of fraud, collusion or bad faith connected with this sale as conducted. Section 6 of article IX of the constitution provided that the County Superintendent "shall be *ex officio* commissioner of lands within his county, and shall discharge the duties of said office under the direction of the State Board of Land Commissioners as directed by law." No attempt is made to construe this. It explains why the County Superintendent happened to be connected with this sale. He did not make the sale—it was the board that made the sale. In truth and in fact, as before said, the only capacity in which the Superintendent acted was that of auctioneer, and the servant of the board to carry the advertisement to the newspaper and tell them to print it. That the superintendent advertised, held and made the sale, in the sense that he usurped any of the functions of the board, as claimed by the plaintiff in error, had no existence in fact.

3. The plaintiff in error says that the land was not offered in legal subdivisions, nor was it laid out in lots and blocks and so sold, and for this reason the sale was void. This contention seems to be based upon Sections 13 and 14 of the Act of 1887. Section 13 provides that the board may cause any portion of the lands to be laid out in lots and blocks and be so sold from time to time at public auction in lots and blocks. This section does not make it necessary to so lay out the land. There was a proviso in Section 14 that in all sales of state land it shall be offered in legal subdivisions of not more than 160 acres. It is plain that this

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provision only refers to land that is so situated as to form legal subdivisions, and not to such a small and irregular parcel of land as this was. It was not a legal subdivision—it was simply an irregular parcel of land, lying in two different subdivisions, and it was impossible to sell it as a legal subdivision. Section 12 of the act provided that any parcel might be sold. This was an irregular parcel of about five acres and could not be sold as forty acres or eighty acres.

4. It is contended that the patent should be annulled because the land was not surveyed prior to the sale, so as to determine the number of acres in it. In the first place, if it was necessary to survey this land prior to the sale there is no evidence that it was not surveyed sufficient to overcome the presumption that the board did what the law required. The statute does not say anything about surveying land. Of course to wisely exercise their discretion, the board ought to survey land if necessary. In the absence of fraud, patents can not be annulled, because the board failed to wisely exercise a discretion given to them. Besides, there is no evidence that this land ought to have been surveyed, or to show that its area was any more than about five acres.

5. Lastly, it is contended that the land was struck off to Hard for a less amount than the minimum price per acre, at which it was advertised to be sold. There is no evidence of this. On the contrary, the evidence is altogether the other way. The amount of land was about five acres; the price received was $7,950; the minimum price fixed in the advertisement was $150 per acre. Courts cannot go outside the record and speculate. If the State Land Board sold 35 or 40 acres of land, pretending that it was about five acres, such fact is not alleged or proven. If it had been, the decision of the lower court might have been altogether different. Courts can only determine matters from

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the allegations and proofs submitted to them. If such fact existed and was not alleged and proven, then the law officers for the state, at the inception and trial of the case, were derelict in the performance of their duties, in not, at least, attempting, in some way, to bring such matter to the attention of the court for determination as a sufficient or insufficient ground for the annulment of the patent.

Perceiving no error in the record, the judgment is, therefore, affirmed.

Judgment affirmed.

Decision *en banc.*

MR. JUSTICE WHITE not participating.

[No. 6287.]

SMITH VS. THE PEOPLE.

1. CONSTITUTIONAL LAW—*Police Power—Public Health*—The police power extends to the preservation and promotion of the public health. The Legislature may define and control the practice of medicine and prescribe the qualifications of those who assume to follow that calling—(273).

2. CRIMINAL LAW—*Practice of Medicine Without a License*—Defendant, without any license from the State Board of Medical Examiners, maintained an office for receiving, treating and healing the sick; assumed the title of Healer, and claimed that by virtue of power from the Almighty he was able to cure any disease that was amenable to the treatment of medical men, and many that were not. He made a charge against some of his patients; others he treated without charge. Held that though he belonged to the Divine Scientific Healing Mission, an incorporated society, the objects of which were "healing suffering humanity by the laying on of hands," though he was a preacher in that society, and held services on Sunday, where he preached and healed the sick, inasmuch as he healed the sick or complaining, for hire, he had incurred the penalties of the statute. (Rev. Stat. c. 127)—(275-277).

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3. ——*Information*—The proviso in the statute "nothing in this act shall prohibit the practice of the tenets or general belief of any church, not prescribing medicines or administering drugs," is not descriptive of the offense, and need not be negatived in the information—(277).

4. STATUTES—*Construction*—A statute (Rev. Stat. c. 127), requiring that all those proposing to follow the healing art shall submit to a certain examination, and prohibiting the practice of medicine without a license from the State Board of Medical Examiners, under a penalty, is to be liberally construed to accomplish its objects; it is not to be classed with those statutes which are construed most strongly against the people—(276).

5. STATUTES CONSTRUED—A statute regulating the practice of medicine and requiring all those who assume to follow that calling to secure a license from the State Board of Medical Examiners contained a proviso that "nothing in this act shall be construed to prohibit gratuitous service in case of emergency, nor the practice of the religious tenets or general belief of any church whatsoever, not prescribing medicines or administering drugs." Held the proviso does not justify or excuse the assumption by an unlicensed person of the title of Healer, the maintenance of a place where the sick or complaining are received and treated for hire, and the holding of one's self out as able to cure or relieve diseases, even though the cure is accomplished by the laying on of hands, and the accused is a preacher in a society incorporated with the object of effecting cures in this manner —(277).

Error to Denver District Court—HON. HUBERT L. SHATTUCK, Judge.

Edward C. Smith was tried, convicted and sentenced to pay a fine in the district court of the city and county of Denver, on an information charging: "Practicing medicine without a license." It contains three counts: The first, that he unlawfully practiced medicine by holding himself out to the public as being engaged in the diagnosis and treatment of diseases and injuries of human beings, without a license; the second, that he unlawfully practiced medicine by maintaining an office for the reception, examination and treatment

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of persons suffering from disease and injury of mind and body, without a license; the third, that he unlawfully practiced medicine by attaching to his name the title "Healer," which indicated that he was engaged in the treatment and diagnosis of diseases and injuries of human beings, without a license.

Mr. W. T. ROGERS for plaintiff in error.

HON. BENJAMIN GRIFFITH, attorney general, Mr. HARRY E. KELLEY and Mr. CHARLES H. HAINES for the people.

Mr. JUSTICE GARRIGUES delivered the opinion of the court.

1. Chapter 127, Rev. Stats., 1908, regulating the practice of medicine, is for the protection of the public health. It creates a State Board of Medical Examiners; requires all persons desirous of practicing medicine within the state, to obtain a license from the board; makes it a misdemeanor to practice medicine in the state without a license; and defines the practice of medicine. Defendant had no license.

Section 6069 defines the "Practice of Medicine" to be, holding ones self out to the public as being engaged in the diagnosis and treatment of diseases or injuries of human beings; or the suggestion, recommendation or prescribing any form of treatment for the intended palliation, relief or cure of any physical or mental ailment of any person, with the intention of receiving therefor, directly or indirectly, any fee, gift or compensation whatsoever; or the maintenance of any office for the reception, examination and treatment of any persons suffering from disease or injury of body or mind; or attaching any word or abbreviation to ones name indicative that he is engaged in the treatment or diagnosis of diseases or injuries of human beings. It further provides, if any person shall hold himself out to

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the public as being engaged in the diagnosis and treatment of diseases or injuries of human beings, or shall suggest, recommend or prescribe any form of treatment for the palliation, relief or cure of any physical or mental ailment of any person, with the intention of receiving therefor, directly or indirectly, any fee, gift, or compensation whatsoever; or shall maintain an office for the reception, examination and treatment of diseased or injured human beings; or shall attach any word or abbreviation to his name indicative that he is engaged in the treatment of diseased or injured human beings, and shall not theretofore have received or shall not then possess a license to practice medicine under the laws of this state, he shall be deemed to be practicing medicine in violation of the statute. But nothing in the act shall be construed to prohibit the practice of the religious tenets or the general belief of any church whatsoever, not prescribing medicine. The information charges the violation of three provisions of the section: first, holding himself out to the public as being engaged in the diagnosis and treatment of diseases; second, maintaining an office for the reception, examination and treatment, for pay, of persons suffering from disease: third, attaching to his name the title, "Healer," indicating that he is engaged in the business of treating diseases.

If the legislature had power to create the State Board of Medical Examiners, and define the practice of medicine; and the acts of the defendant come within the statutory definition and are not excluded by the exemption; and the evidence shows he committed any one of the acts charged, the conviction should be sustained.

2. The legislature under the police power of the state, could create the State Board of Medical Examiners, and fix its powers and duties. The police power of the state relates to the preservation and promotion of the health, safety and morals of the people. The law is settled that the legislature may control the practice of

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medicine. Such enactments emenate from that branch of the police power of the state having to do with the protection of the public health.—*Harding v. People*, 10 Colo. 387; *Reetz v. Mich.*, 188 U. S. 505; *Dent v. West Virginia*, 129 U. S. 114; *Hawker v. N. Y.*, 170 U. S. 192; *State v. Marble*, 72 O. St. 21; *State v. Wilhite*, 132 Ia. 226; *State v. Davis*, 194 Mo. 485; *Ex Parte Whitley*, 144 Cal. 169; *Parks v. State*, 159 Ind. 226; *State v. Heath*, 125 Ia. 589; *Little v. State*, 60 Nebr. 749; *State v. Buswell*, 40 Nebr. 158; *Bragg v. State*, 134 Ala. 166; *People v. Gordon*, 194 Ill. 560; *Jones v. People*, 84 Ill. App. 453; *State v. Gravett*, 65 O. St. 289; *People v. Mulford*, 125 N. Y. Sup. 680; *State v. Welch*, 129 N. C. 579; *Bibber v. Simpson*, 59 Me. 181; *Hewitt v. Charier*, 16 Pick. 353; *Davidson v. Bohlman*, 37 Mo. App. 576; *Eastman v. People*, 71 Ill. App. 236; *People v. Allcutt*, 189 N. Y. 517; *O'Neil v. Sate*, 115 Tenn. 427; *State v. Yegge*, 19 S. Dak. 234; *People v. Arendt*, 60 Ill. App. 89; *People v. Phippin*, 70 Mich. 6; *Com. v. St. Pierre*, 175 Mass. 48; *Com. v. Jewelle*, 85 N. E. 858; *Com. v. Porn*, 196 Mass. 326; *State v. Bresee*, 114 N. W. 45; *State v. Heffernan*, 28 R. I. 20; *State v. Pollman*, 98 Pac. 88.

3. The state has the right to determine and define what constitutes the practice of medicine.—*State v. Edmunds*, 127 Ia. 333; *State v. Yegge*, 19 S. Dak. 234; *Little v. State*, 60 Nebr. 753; 30 Cyc. 1561.

4. The people's evidence shows that defendant kept a place of business for healing the sick, at 1439 California street, City and County of Denver; that there were signs in the windows reading: "Professor Smith, Healer." "Office hours 9 to 12, 2 to 6;" a sign on the door reading: "Professor Smith, Healer." "Walk in." His office comprised two nicely furnished rooms, with carpets, chairs, tables, pictures, etc. He claimed his treatment was a natural one—a gift from the Almighty; claimed to restore people to health; said he could cure any disease a medical man could, and

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many they could not; could cure diarrhoea, and stomach, spinal, nervous and throat troubles, and pneumonia; mentioned several cases of pneumonia he had recently cured that doctors had given up; said he diagnosed his cases and treated them without medicine.

Defendant testified that he belonged to the church of "The Divine Scientific Healing Mission," a corporation; that he was a preacher of the gospel, and a healer of the sick; held services Sunday afternoons at Howe Hall, where he preached and cured the sick; said his church had branches everywhere; he occupied a couple of living rooms, not an office, where he lived and treated the sick and afflicted without the use of drugs or a knife; some he charged, some he did not; never turned anyone away; the signs had been there for over two years and spoke for themselves; did not practice medicine or diagnose diseases; people came to his rooms. told him what was the matter with them, and he treated them; could not tell whether patients had gout, smallpox or rheumatism, but could and did treat and cure them; "Healer" means curing the sick. The certificate of incorporation of "The Divine Scientific Healing Mission," showing its objects to be: "preaching, teaching and practicing the gift of healing, guided and directed by divine power, by laying on of hands, regardless of faith, creed, sect or race, to promote peace on earth, good will to men;" also containing the tenets of "The Divine Scientific Healing Mission," as follows: "We believe in healing the suffering humanity by laying on of hands to be the gift of the divine spirit, and by sound reason we can comprehend its virtue," was offered in evidence and excluded by the court.

It is the nature of defendant's business, not the objects of the corporation or the tenets of his church that is in controversy. The evidence shows he was practicing medicine within the definition of the statute, and was using the title "Healer," to his name, to

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indicate that he was engaged in the business of healing the sick. He treated in his office or place of business, for hire, persons suffering from disease, for the purpose of curing them. He held himself out to the public as a professional healer of diseases, and a practitioner of the healing art. The statute lays hands on commercial healing as a money making occupation, business or profession, regardless of the method of treatment or curative agency employed. It concerns the public health, and should be liberally construed to accomplish the object of its enactment. It does not belong to that class of penal statutes construed most strongly against the people. As a protection to the public health, it requires those engaged in the business of curing the sick, to possess certain qualifications. It is not concerned with the school, sect, or system of healing, or the method of treatment. One form of examination is required of all sorts of healers. All applicants must be examined in anatomy, physiology, chemistry, symptomatology, toxicology, pathology, surgery and obstetrics. All schools teach these branches, and use the same text books. They are the fundamentals in which all applicants must be grounded before they can be licensed to follow the business of curing the sick. There can be no difference of opinion among intelligent men on the subjects above enumerated; but there is great difference in regard to treatment; hence the statute expressly prohibits any examination in materia medica or therapeutics. In the eye of the statute, methods of treatment meet upon a level as curative agencies in healing human ills. There is no discrimination, partiality or monopoly. It requires, however, that the healer shall possess a reasonable amount of learning before he enters upon the business of curing the sick. The discrimination goes to the degree of learning, and not to the school, sect, system or creed. As a protection to the public health, the state fixes the standard of compe-

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tency and makes the right to engage in the business dependent upon the possession of certain knowledge.

5. Defendant claims he comes within the exemption which says: "Nothing in this act shall be construed to prohibit * * * the practice of the religious tenets or general beliefs of any church whatsoever, not prescribing or administering drugs." The constitution provides, there shall be no interference with the "free exercise and enjoyment of religious profession and worship." The statute does not interfere with the free exercise of religion or worship. Any persons, individually or collectively, any minister, or any church congregation may resort to prayer whenever they wish for the healing of the sick. No attempt is made to interfere with religion or religious devotions. This does not, however, authorize one under the cover of religion or a religious exercise, to go into healing commercially for hire, using prayer as the curative agency or treatment. Religion cannot be used as a shield to cover a business undertaking. Defendant was engaged in a business venture, not a religious exercise. The practice of medicine, defined by our statute, means the practice of the healing art commercially, regardless of the curative agency employed. The commercial practice of healing by prayer, followed as a money making venture or occupation, is the practice of medicine within the plain meaning of the statute.

6. The exemption mentioned in the statute is not descriptive of the offense, and it was not necessary for the people to negative the exemption in the information. —*Johnson v. People*, 33 Colo. 230; *Langan v. People*, 32 Colo. 418; *Packer v. People*, 26 Colo. 306; *Poole v. People*, 24 Colo. 510; *Mitchell v. People*, 24 Colo. 533.

Affirmed.

CHIEF JUSTICE CAMPBELL concurs.

MR. JUSTICE MUSSER concurs in the conclusion.

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Mr. JUSTICE MUSSER specially concurring:

I concur in the conclusion only. In order to reach a verdict of guilty, the jury must necessarily have found, beyond a reasonable doubt, that the defendant did not come within the exception of the statute. The evidence that he was within the exception, if there was any, was such that no court would be warranted, in the face of the verdict, in saying that he did come within the exception. Of course, if, upon all the evidence, there was a reasonable doubt that he was without the exception, he was entitled to the benefit of that doubt and to an acquittal. It does not appear to me, upon all the evidence, that there could be any doubt that he was without the exception. The remarks of the trial judge, in the presence of the jury, were not right and were erroneous. In most instances, such things would necessarily be prejudicial to a defendant. In this case, the court fended the effect of his utterances, to some extent, by an instruction. Under the evidence, as it appears to me, there was no reasonable doubt that the defendant was without the exception of the statute, so that the jury must have found as they did in any event.

For these reasons, I look upon the error committed by the judge as not prejudicial, and feel that, upon the whole record, the defendant had a fair trial.

[No. 6407.]

METALLIC GOLD MINING COMPANY V. WATSON.

1. MASTER AND SERVANT—*Master's Duty as to Place of Work*—Where the servant's employment is that of making a dangerous place safe the rule that the master must provide him a safe place in which to work has no application, e.g. where an experienced miner, familiar with all the dangers of the employment and the condition of the mine is set to timber an unsafe place in order to future safe working therein. In such case the servant

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knowing the danger, there being no negligence on the part of the master, assumes the risk—(284).

2. NEGLIGENCE—*Question for the Court*—When the facts are not in dispute, and it is plain that the plaintiff assumed the risk of injury, the trial courts should so decide as a matter of law—(284).

3. PLEADING—*Filing Replication at Trial—Discretion of Court*—The trial court may in its discretion allow a replication to be filed after a motion for judgment for want of it, and after the jury are empannelled—(286).

4. JURY—*Challenge for Cause*—In the action of a servant against master for an injury attributed to the negligence of the latter, one called as a juror and examined on the *voir dire*, testified that he entertained a natural sympathy for a laboring man; that if the evidence was clear this would make no difference with him; that he would try the case entirely upon the evidence and the instructions of the court, allowing nothing else to influence him; but that it would require perfectly clear evidence to overcome his feeling for the laboring man. *Held*, that a challenge for cause should have been sustained—(286).

5. INSTRUCTIONS—*Not Applicable to the Evidence*, are misleading and should not be given—(286).

Appeal from Teller District Court—HON. JAMES OWEN, Judge.

Plaintiff alleges, that March 19, 1906, he worked for defendant on a mining claim in Teller county, and was sent into a drift on the second level, where there had theretofore been a cave-in; that defendant knew it had occurred several months before, but did nothing to prevent further cave-ins or injury in the drift; that no timbering had been placed therein, and the law had not been complied with requiring mines to be made safe; that the mine was then in a dangerous and unsafe condition, and, when it sent him into the drift to work, defendant knew its condition; (It will be observed he fails to state what work he was sent to do, or was doing in the drift at the time of the accident, and that he had no knowledge of the condition.) That he worked there a little less than an hour, when a portion of the walls

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fell down upon and severely injured him, which was due to no negligence of his, but to the negligence of the defendant. The second defense alleges that plaintiff's injuries, if any, were caused by his own negligence. The third, that he received them while engaged in employment the risk of which he assumed when he entered and continued in the employment.

August Holmes, a juror challenged by defendant for cause, on his *voir dire*, testified:

"I entertain a natural sympathy for the laboring man; am a miner myself. Q. If you started into the trial of this case, you feel that you would start in with a bias in favor of the plaintiff in this case? A. If it was a leaning any way at all, it would lean towards the laboring man. Q. Do you think that the sympathy that you would entertain for a laboring man who has been injured would cause you to favor him in the beginning of the case, and cause your mind to lean in favor of him? A. If the evidence was clear, it wouldn't make any difference to me at all. Q. You state that if the evidence was clear, you would be able to decide fairly? A. Yes, I would. Q. Just explain what you mean by that? A. If the evidence was muddled the least bit, I would favor the laboring man. Q. It would require perfectly clear evidence against him in order to overcome that feeling, is that correct? A. Yes."

The Court: "In the trial of this case would you be governed solely by the evidence as you hear it from the witness stand, and the instructions as regards the law as given you by the court, in arriving at your verdict in this case? A. Yes, sir. Q. You would allow nothing else to influence your verdict in this case? A. No, sir; I wouldn't."

Challenge denied. Defendant exercised four peremptory challenges, Holmes being one of the four.

After the jury was empaneled, before the intro-

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duction of evidence, defendant moved for judgment because, 1st. Upon the pleadings and the law, plaintiff is not entitled to recover. 2nd. The complaint does not state facts sufficient to constitute a cause of action. 3rd. There is no reply to the defense of contributory negligence. 4th. There is no reply to the defense of assumption of risk. 5th. The complaint alleges a dangerous condition, but does not allege plaintiff had no notice or knowledge of it. Upon oral application, unsupported, the court allowed plaintiff to file, instanter, a reply denying the affirmative defenses, and then overruled the motion.

Statement of Facts: To properly understand the case, it is necessary to make a somewhat extended statement of the facts. Plaintiff, an experienced miner, thirty-nine years of age, familiar with all departments of underground metalliferous mining, was employed October 26, 1905, by the defendant on the Bill Nye lode mining claim. It was a prospect, and the company was working four men under a superintendent named Blanchard. The departments of labor were not separated as in large mines, and the miners did the timbering. In August and September, 1905, a drift was run on the second level through a lime formation, requiring no timbering at the time; but exposure to air caused it to slack, and pieces of rock to fall from the roof, which, at the time of the accident, was from seven to eight feet above the floor. From his employment in the mine until the accident, some five months, plaintiff passed through the drift several times daily and was as familiar with its condition as the defendant. There had been no work in or on this drift since it was driven, but it was used by the miners as an entry or passageway to and from their work, and they kept powder stored in it which plaintiff removed on account of the condition of the roof. No one was injured, however, from this use of the drift. An ore-shoot was exposed in the roof

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and Blanchard concluded to make an up-raise and stope it out. The work plaintiff was sent into the drift to do, and was doing when he was injured, of which he speaks in his complaint, was timbering for the upraise. Under the directions of Blanchard he cleared away the fallen material under the ore-shoot, and set six posts 6 ft. 6 in. high, three on each side lengthwise the drift, on which he placed caps, 9 ft. long, across which lagging would be put, to make it a safe place to work. The best timbers were used, and the best plan of work adopted. In the roof over his head, in the ore-shoot, was a seam or crack, indicating that a slab, with which he was familiar, was liable to fall. He worked about thirty minutes with his pick and drill trying to get it down, but failed, and was satisfied from the examination he made, it was safe. While working, plaintiff said to Blanchard, that he did not think much of the job. Blanchard examined the rock overhead, said he thought it was safe, and to go ahead. Plaintiff did not tell Blanchard about trying to pry it down. When plaintiff was cutting a hitch or shoulder for a spreader between the center posts, and Blanchard was standing by his side, the slab over their heads, which plaintiff had tried to pick down, fell upon them and injured plaintiff severely. We quote from plaintiff's testimony:

"Q. What kind of work were you starting to do at that particular place; upraise? A. He (referring to Blanchard) was going to take out that ore. He said there was ore there, and he was going to take it out. Q. Then you were starting the upraise at that time, and timbering, in order to make it safe to upraise? A. That is what he said. Q. It was necessary, wasn't it, before you could work permanently in that place, and make the upraise, to put these timbers in to protect the men? A. Yes. Q. You would consider it necessary, wouldn't you? A. Certainly. Q. Somebody had to

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do that work, didn't they? A. Yes, certainly. Q. In order to protect the men before they could go ahead and make their upraise? A. Certainly. Q. And that was the work you were engaged in at that time? A. Yes."

Speaking of the slab that fell upon him, he said:

I tried to pick it down; it wouldn't come; used a pick and drill; spent fifteen or twenty minutes, perhaps thirty minutes, trying to get that slab down; spent probably thirty minutes digging at this slab, digging in there trying to get it down; after I had finally stopped trying to get this slab down, felt that it was up there perfectly safe and securely.

"Q. Now, after you had made that effort, did you, because of this personal examination, conclude that it was safe? A. I thought it was safe there, certainly I did. Q. That was your judgment? A. That was my judgment. Q. What I mean is, was there anything about the appearance of this particular slab that made you think it was dangerous; any slips or seams or cracks or crevices? A. No more than had been in there for a week or two before; there had been a crack in it. Q. You had seen that for a week? A. Yes. Q. You are sure of that? A. Yes sir. Q. So after all your effort in there working for half an hour at it, you couldn't pry it down and you concluded it was safe? A. I thought it was safe; I certainly did."

"Q. I say, both you and Blanchard examined the roof? A. Yes sir. Q. And you concluded that it was safe? A. Yes. Q. And Blanchard told you he thought it was safe? A. Blanchard said it was safe."

Verdict and judgment for plaintiff in the sum of $7500.00. The case is here on appeal.

Mr. CHAS. C. BUTLER for appellant.

Mr. E. G. VANATTA and Mr. JAMES M. BRINSON for appellee.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court.

1. Plaintiff was an experienced miner, and timbering was part of his employment. He had worked at the mine about five months and was as familiar with the condition of the drift as Blanchard, the superintendent. Defendant concluded to make an upraise in the drift to stope out the ore, and to make it a reasonably safe place to work, it was necessary to timber. The rule that where one employs another, he must exercise ordinary care to furnish the employe with a reasonably safe place to perform the services, has no application to this case. Plaintiff was engaged in making a dangerous place reasonably safe. Timbering for the upraise was necessary to make a reasonably safe place to work. To require a safe place to work while timbering, before timbering, to make it safe, would mean no timbering. Some one had to assume the risk in the beginning. Plaintiff was under no obligation to timber for the upraise, but if he did, and was injured, without negligence upon the part of the defendant, he assumed the risk, and cannot recover. The trial court should have decided as a matter of law, that plaintiff assumed the risk.—*Poorman Silver Mines v. Devling*, 34 Colo. 37; *City of Greeley v. Foster*, 32 Colo. 293; *Denver Tramway Co. v. Nesbit*, 22 Colo. 408; *Wells v. Coe*, 9 Colo. 159; *Iowa Gold M. Co. v. Diefenthaler*, 32 Colo. 391; *Dickson v. Newhouse*, 34 Colo. 228; *Victor Coal Co. v. Muir*, 20 Colo. 320; *Colo. Coal & Iron C. v. Lamb*, 6 Colo. App. 266; *Stiles v. Richie*, 8 Colo. App. 393; *Harvey v. Mountain Pride G. M. Co.*, 18 Colo. App. 234; *Finlayson v. Utica M. & M. Co.*, 67 Fed. 507; *Walker v. Scott*, 67 Kan. 814; *Christienson v. Rio Grande*, 27 Utah 132; *Naylor v. C. & N. W. Ry. Co.*, 53 Wis. 661; *Morbach v. Home M. Co.*, 53 Kan. 731; *Skidmore v. W. Va. Co.* 41 W. Va. 293; *Hassie v. Peel Co.*, 41 W. Va. 620; *Reed v. Stockmeyer*, 20 C. C. A. 383; *Aldridge v.*

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Furnace Co., 78 Mo. 559; *Smith v. Hecla M. Co.*, 38 Wash. 454; *Watson v. Coal Co.*, 52 Mo. App. 368.

2. Where one, hired to work for another, is injured in an accident, primarily there is no reason why the employer should be liable for the injury. The mere fact that one man gives employment to another is no legal reason why the employer should be liable for an injury received in an accident. We must not lose sight of the universal law of cause and effect. Plaintiff must show that defendant's negligence caused his injury. Negligence, and not employment, is the basis of liability. There is no proof of any negligence in this case, upon which to base a verdict. Plaintiff was not suddenly ordered by a superior into a dangerous place about which he knew nothing, and had no time to examine. He was doing the work for which he was employed, and with which he was familiar. He knew the place, and the purpose for which the work was being done. The best timbers and the most approved method of timbering was adopted. He had not only equal means of knowledge, but equal knowledge with the defendant. He and Blanchard examined the place together and both agreed it was safe. If with his years of mining experience he thought it was safe, it cannot be said that the company was guilty of negligence when the superintendent examined it and coincided with him. It is useless to consider the supposed case; had plaintiff been injured by a rock fall while going through the drift as a passageway to or from his work. Such is not the case.

The complaint does not state the ultimate facts truthfully. It is drawn to get past the court to the jury, and is remarkable in what it fails to state. If plaintiff had truthfully stated the ultimate facts as he proved them on the trial, he would have stated himself out of court. No cause of action, based upon negli-

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gence, can be stated on the facts proven. The court should have held as a matter of law, that there was no negligence proved, upon which to base a verdict.

3. Filing a replication instanter was a matter that rested in the sound discretion of the court, and was not abused in this case.

4. Litigants are entitled to have their cases tried to fair minded, impartial jurors. The code provides as a ground of challenge for cause, the existence of a state of mind in the juror evincing bias to either party. The examination of the juror Holmes, showed a state of mind evincing strong bias in favor of one of the parties. It showed that he would require a reversal of the order of proof and place upon the defendant, the burden of disproving the plaintiff's case. The challenge for cause should have been sustained.—*Ancient Order of United Workmen v. Taylor*, 44 Colo. 373.

5. The court instructed the jury:

2. "Where several acts or conditions of things,—one of them the wrongful act or omission of the defendant,—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission."

This aptly illustrates an instruction containing correct principles of law, without application to the evidence in the case on trial. It seems to be copied from the syllabus in the case of *City of Denver v. Johnson*, 8 Colo. App. 384, where the question was, whether an act of the city or of the Tramway Company, was the cause of the injury. The principle of law announced in that case is right; embodied in an instruction in this case, it is wrong. In this case the act of some third person or agency is not involved. Instructions should be based upon the evidence, and no instruction should as a rule

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be given, which is not relevant to facts which there is some evidence tending to prove. This instruction, applied to the facts in this case, is misleading, and should not have been given. *Reversed.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE MUSSER concur.

[No. 6542.]

BRADBURY v. WHITNEY.

1. CONTINUANCE—*Absent Witness—Motion—Affidavit*—A motion for the continuance of a cause over the term, on account of the absence of witnesses, the affidavit not showing that their attendance cannot, by diligence be procured in the pending term, may be denied on this ground—(291).

The affidavit must show the testimoy which it is expected that the absent witness will give, so that the court may judge of its materiality. The statement that it is "very material" is a mere conclusion—(291).

2. ——*Discretionary*—A motion for the continuance of a cause is in a large degree addressed to the discretion of the court—(290).

The action had been commenced in September. In June following it was set down for trial a month later. Of this the defendant had seasonable notice. Shortly before the trial defendant's attorney was suddenly called away upon important affairs, long pending, and left the cause in charge of another attorney. On the day appointed for the trial the defendant interposed an application for a continuance on the ground of the absence of two witnesses. The affidavit was sworn by his private secretary, the defendant himself not being present. As to one of the witnesses the affidavit stated that he had been suddenly called out of the state, but it was not shown that his deposition could not have been taken, nor that he would not return during the pending term, nor what testimony he could give. As to the other witness it stated that he was an engineer in the employment of a railroad company somewhere upon the line of its railroad. The only effort which was shown to procure his testimony was to address a letter to him, through the railroad company, to which no answer had been received. The motion being

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denied the attorney retired from the cause and a verdict was rendered in favor of the plaintiff.

Held, that inasmuch as to one witness the materiality of his testimony was not shown, nor as to the other diligence in procuring his testimony, it was not to be said that the court abused its discretion in denying the motion—(290-292).

3. VACATING JUDGMENT—*Mistake—Surprise, Excusable Neglect*—A judgment is not to be vacated merely because a meritorious defense is shown. In the same case, on motion to vacate the judgment, it was held that inasmuch as the defendant knew nearly a month in advance that the cause was set for trial, his absence was not shown to be due to any mistake, surprise, inadvertence or excusable neglect; that as his private secretary who knew more of the case than defendant himself was present at the trial, and another witness was accessible, who had much information in regard to the plaintiff's demand, it was an error on the part of the secretary and the attorney to retire from the case; that their action in the premises must be regarded as deliberate; and that none of the statutory grounds appearing (Rev. Code, Sec. 81) the motion to vacate the judgment was properly denied—(291-293).

Error to Otero District Court—HON. CHARLES S. ESSEX, Judge.

Mr. FRED A. SABIN for plaintiff in error.

Messrs. GLENN, BEALL & GOBIN for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the Court:

An action was commenced in the district court of Otero county by Whitney, as plaintiff, against Bradbury, as defendant, to recover for a certain amount of hay, alleged to have been sold and delivered to the defendant. The defendant answered, substantially denying the allegations of the complaint. The case was regularly set for trial on July 9th. Before the day of trial, the defendant's attorney was compelled to go East on important business. He left the matter in

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charge of another attorney, and so informed the defendant. On the trial day, a motion for a continuance, supported by affidavit, was presented by this other attorney to the court. The motion was based upon the ground that the defendant could not safely proceed to trial on account of the absence of certain witnesses. The motion for a continuance was denied. The case was called for trial. For some reason, the attorney, who had been left in charge of the matter, withdrew when the continuance was denied, and it appears that, at the trial, plaintiff and his counsel were present, while the defendant came not, either in person or by attorney. A trial was had, evidence introduced on the part of plaintiff, and a verdict returned against the defendant, upon which verdict a judgment was entered on July 9th. Nothing more was done in the case until August 16th, when the defendant filed a motion to vacate and set aside the verdict of the jury, and the judgment entered thereon, on grounds which were briefly, in substance, that the hay mentioned in the complaint was sold and delivered to another party, and not to the defendant, and the defendant was not, in any manner, liable for it; that while the defense had been fully set forth in the answer, there had never been any trial of the issues, and the defendant did not have his day in court; that his failure to make a defense was through no fault of his, and was entirely excusable; that the defendant lived in Denver and was not in possession of all the facts necessary to his defence, and the evidence of certain agents and employes of the defendant, at the time, was necessary to establish the defense; that for certain reasons mentioned, these witnesses could not be obtained at the trial, and the facts to which they would testify were set out; that the attorney of the defendant was, on the 5th day of July, peremptorily called East on business, which had been pending for some months; that he left the case in

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charge of another attorney, not knowing that the witnesses would or could not be present, but believing that at least one would be; that, in consequence of the absence of said witnesses, no testimony was introduced on behalf of defendant, and that the testimony introduced on behalf of plaintiff was insufficient to entitle the plaintiff to recover. A transcript of plaintiff's testimony was introduced in support of the motion. This motion was made under section 81 Rev. Code, which provides that the court may "upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment order or other proceeding, taken against him through mistake, inadvertence, surprise or excusable neglect." The motion to vacate was overruled. The defendant made a strong showing of merit in connection with this motion, but no matter how much it may be desired to afford relief, this court can not, on review, reverse the judgment without overturning some well established rules of practice enjoined both by statute and by previous decisions. For nearly a month previous to the day fixed for trial, the defendant had full notice that the case was set for trial. The motion for a continuance is addressed, in a large degree, to the discretion of the time the case was called.

If section 421 Rev. Code will permit a review of the action of the court upon the motion for a continuance, that action can not be disturbed. It has been repeatedly said by this Court that a motion for a continuance is addressed, in a large degree, to the discretion of the trial court, and the ruling thereon will not be disturbed, unless it appears that there was an abuse of discretion.—*Dawson v. Coston*, 18 Colo. 493; *Michael v. Mills*, 22 Colo. 439; *Purse v. Purcell*, 43 Colo. 50.

Section 194 Rev. Code provides that, "a motion to postpone a trial on grounds of the absence of evidence shall only be made upon affidavit showing the ma-

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terialty of the evidence expected to be obtained, and that due diligence has been used to procure it." The motion for a continuance in this case asked for a postponement until the next term of the court. Reference to section 1458 of the Revised Statutes reveals that the trial day on July 9th was in the June term of the district court then in session. The next term of the district court began on the third Monday in October. The record does not disclose that the June term was about to end in July. It does not appear that it was at all necessary to postpone the trial of the case until October, or that the evidence desired could not have been procured long before October, and before the adjournment of the June term, by the exercise of due diligence. The affidavit stated that one of the witnesses had been suddenly called out of the state, but it is not made to appear that he would not return until October, or until after the adjournment of the June term of court, or that his deposition could not be taken. Furthermore, the materiality of the testimony expected to be obtained from him was not shown by the affidavit as the statute requires. In fact the affidavit said that the affiant was not informed as to the nature of the testimony that the witness would give, but affiant had been informed that it was material. When the affiant said merely that the testimony was material, he stated only a legal conclusion, and when he said that he did not know what the testimony would be, he certainly failed to show the materiality of the evidence expected to be procured from the witness. As to the other witness, it was made to appear that he was an engineer—whether civil or locomotive is not stated—and that he was in the employ of a certain railroad company, somewhere upon the line of its road, and the only effort made to find him was to address a letter to him through the railway company, which had not been answered on the day of trial. The action was commenced in September, about

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ten months before the day of trial. It had been set for trial almost a month before the trial day. Under the circumstances appearing in the affidavit for continuance, the trial court may well have thought that, as to one witness, the affidavit failed to show the materiality of the evidence expected to be procured, and as to the other, that due diligence was not exercised to procure his testimony. As the statute requires these matters to be shown, this court can not say that the lower court did not wisely exercise its discretion in denying the motion for a continuance. The defendant in error insists that the condition of the record is such that the sufficiency of the evidence to sustain the judgment can not be reviewed. The plaintiff in error does not ask that this evidence be reviewed. He says that it was introduced solely to show merit in connection with his motion to vacate the judgment. If it is considered for that purpose, and it is found that the showing of merit was sufficient, that alone would not be sufficient to warrant a court in setting aside a judgment. One or more of the statutory grounds must exist. In this case, none of the statutory grounds are present. The judgment was not taken against the defendant "through mistake, inadvertence, surprise or excusable neglect," as those terms are understood in such a statute, nor can the statute apply here.—1 *Freeman on Judgments*, §§ 105, 113 *et seq.*; 1 Black on Judgments, § 335 *et seq.*

The defendant knew the case was set for trial. He, or his representative, must have known that after the motion for a continuance was overruled, the trial would proceed, and that the plaintiff, in all probability, would take judgment against him. His absence from the trial was not caused by any mistake, inadvertence, surprise or excusable neglect. His private secretary was present, and made the affidavit for a continuance, and in it stated that he knew more about the matter than the defendant himself. He must have known something

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about the authority of the man who bought the hay to bind the defendant. There was another man down there who appears to have known a great deal about the matter. The private secretary and attorney should have participated in the trial and not have deliberately withdrawn therefrom. On a motion for a non-suit, the insufficiency of the evidence for plaintiff could have been shown to the court, and the court might have found it insufficient. If the court would not have done so, such evidence as was at hand, could have been presented. If the verdict went against the defendant then he could have, in apt time, filed and argued a motion for a new trial. If all failed below, he, having saved all necessary exceptions, could have come to this court with a record, proper to be reviewed on all matters set forth in the motion to vacate. The motion to vacate the judgment was, in substance, a motion for a new trial, made long after the time limited for the filing of such a motion.

Under the circumstances, there is nothing that this court can do but affirm the judgment, and the same is accordingly done.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GARRIGUES concur.

[No. 6548.]

KING ET AL. v. WATSON.

1. JUSTICE OF THE PEACE—*Appeal—Effect*—Where in an action before the justice of the peace, an attachment is issued and levied, and a forthcoming bond given by the defendant a judgment of the justice dissolving the attachment is not final. An appeal taken and perfected in due season in the main cause, keeps the attachment in force, and brings this ancillary proceeding into the county court as an incident; and if in the county

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court the attachment is sustained and judgment given for the plaintiff the sureties in the forthcoming bond are liable—(295, 296).

2. ATTACHMENT—*Forthcoming Bond—Effect*—The giving of a forthcoming bond by the defendant, and the release thereupon of his chattels which have been taken under attachment, does not dissolve the attachment—(296).

3. ——*Demand*—And where upon special execution issued from the county court, upon a judgment for the plaintiff, upon an appeal from the justice of the peace, before whom the cause was instituted, neither the defendant nor the attached goods are found, the plaintiff may have his action against the sureties in the forthcoming bond, though no demand is averred—(297).

The law does not require impossibilities—(297).

4. SURETIES—*Relation to Cause*—The sureties in a forthcoming bond given to release chattels attached in an action commenced before a justice are not strangers to the judgment given in the county court, on an appeal from the justice, in such sense that they may acquire rights in the attached property as against the parties to the action—(296).

5. CASES DISTINGUISHED—Murray v. Ginsberg, 10 Col. Ap. 63. —(297).

Error to Pueblo County Court—HON. FRANK G. MIRICK, Judge.

Mr. JAMES A. PARK for plaintiff in error.

Mr. JOSEPH DYE for defendant in error.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court:

This is an action against sureties on a forthcoming, or delivery, bond. The instrument was given by a defendant in an action before a justice of the peace, to secure the release of his personal property attached therein, and its surrender to defendant by the constable followed, as the statute requires. Upon the trial before the justice, judgment was for defendant, and the attachment was dissolved. Within the statutory time therefor plaintiff appealed from the judgment to the county court. Defendant did not follow up the appeal,

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and judgment in the county court went for plaintiff and the attachment was sustained. A special execution was issued out of the county court directing the sheriff to sell the property theretofore attached while the action was pending before the justice, and the sheriff made a return upon the writ that neither defendant nor the property could be found. At plaintiff's instance he then demanded of the sureties return of the property, which was refused. This action was thereupon brought by plaintiff against them on their forthcoming bond. It was in the alternative, that if the judgment was for plaintiff and the attachment was sustained, the sureties would restore the released property to the constable, or pay plaintiff the amount of the judgment.

The sureties, who were unsuccessful below, rely for reversal chiefly upon the proposition that the dissolution of the attachment by the justice of the peace, when he decided the cause upon its merits for the defendant, operated as a release of the sureties upon their forthcoming bond. If, on the appeal, the county court had dissolved the attachment and its judgment to that effect was not set aside, the sureties' obligation would cease. But the judgment of the justice was not final. It was appealed from by plaintiff within the statutory time, and the cause was lodged in the county court, and trial there resulted in a judgment for plaintiff and the attachment was sustained. Trial in the county court was *de novo*, and whether or not the order of the justice of the peace dissolving the attachment is separately appealable, the appeal from the judgment in the main cause brought up the ancillary attachment proceedings as an incident thereto.

The case at bar is, in principle, decided against the contention of plaintiff in error here in *Hurtgen v. Kantrovitz*, 15 Colo. 442. That action was commenced before a justice of the peace by attachment upon promissory notes not due at the time. The affidavit for attach-

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ment was traversed and the justice sustained the traverse, dissolved the attachment and gave judgment upon the merits for defendants. Plaintiff appealed from the justice's judgment to the county court. The trial there was in plaintiff's favor and the attachment was sustained. These facts fit this case exactly. The point made in that case, when it reached the supreme court, was that the order of the justice dissolving the attachment was not appealable and for this reason could not be reviewed in the county court when the appeal was merely from the judgment on the merits. This court said the point was not well taken, and that, where there was a final judgment for defendants before the justice and plaintiff appealed therefrom, "the attachment issue was thereby appealed as a part of the main case." The court remarked that no rights of third persons were involved, and that where they are it might be that the attachment lien as against them would be lost. No rights of third persons are here asserted. The sureties upon the forthcoming bond are not strangers to the judgment in the county court in the sense that they may, if at all, like a subsequent purchaser, or incumbrancer, in good faith, acquire rights as against the plaintiff or defendant in the action.

Our conclusion is in line with the authorities generally. In Drake on Attachments (7 ed.) Sec. 428, the learned author says that "where the attachment plaintiff acts promptly in taking the case to a higher court, by appeal or writ of error, operating as a *supersedeas*," the lien of the attachment is not divested. In 3 Am. & Eng. Enc. of Law (2 ed.) p. 242, it is said that where "the plaintiff perfects his appeal within the required statutory time it will have the effect of preventing the dissolution of the attachment, which would otherwise be caused by judgment in favor of the defendant." Of course, if the attachment is not dissolved, the obligation

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of the sureties on a delivery bond to redeliver the attached property, if the appellate court sustains the attachment, is continued as a result of such appeal. Though not directly in point, *Chittenden v. Nichols*, 31 Colo. 202, which establishes the doctrine that a forthcoming bond, though it releases attached property from the custody of the officer, does not dissolve the attachment, is in line with our conclusion. In *Collins v. Burns*, 16 Colo. 7, Mr. Justice Helm, in speaking of the method of procuring the dissolution of attachments and the return of the property, said, if the specific remedies provided by the statute are not invoked, "there seems to be no legal alternative but for the levy to remain in force, and for the sheriff to retain possession of personal property taken under his writ." This harmonizes with our conclusion, which is, that where a forthcoming or delivery bond which is given by a defendant in a justice's court to secure, and is followed by, the release of attached personal property, though the justice of the peace thereafter finds for defendant, and dissolves the attachment, the sureties are still liable on their bond, if, on a duly perfected appeal to the county court by plaintiff, the appellate court on a trial *de novo* renders judgment for plaintiff and sustains the attachment.

The further point is made that upon the agreed statement of facts it does not appear that a demand was made by plaintiff, judgment creditor, against defendant for a redelivery of the property to the constable or to the sheriff, although such demand was made of the sureties, and *Murray v. Ginsberg*, 10 Colo. App. 63 is cited. That case is authority for the contention under its own facts. Here, however, the record shows that neither the property nor the defendant was within the jurisdiction of the county court, and defendant could not be found. The judgment creditor could not, therefore, make demand upon the judgment debtor for such return. The law does not require an impossibility,

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and this action will not be defeated because demand was not made on a party who could not be found. Other reasons might be assigned for the affirmanec of the judgment. No other questions argued merit consideration. The judgment should, therefore, be affirmed.

Affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE HILL concur.

[No. 6584.]

SILVER MOUNTAIN MINE COMPANY v. ANDERSON.

1. APPEARANCE—An action in the county court was dismissed for non-appearance of the plaintiff. Plaintiff perfected an appeal to the district court. In that court the defendant, not limiting his appearance, interposed a motion to dismiss the appeal on the ground that the judgment of dismissal was merely interlocutory, and in effect a voluntary non-suit, so that no appeal lay and the district court was without jurisdiction.

Held, a general appearance—(301).

3. APPEALS—*What May Be Assigned for Error—Errors Waived*—The defendant, having, after the denial of his motion to dismiss an appeal, by which the cause had been brought from the county court to the district court, participated in the trial of the cause, *held*, that he was not in position to assign for error the denial of his motion to dismiss in the district court; that the error if any in the denial of his motion was waived—(301).

3. PRINCIPAL AND AGENT—*Proof of Agency* may be circumstantial, *e. g.*, the recognition of the agency by the principal—(305).

4. ——*Liability of Principal*—The principal is bound by the acts of the agent within his apparent authority, unless, the agency being limited, this is brought to the knowledge of those dealing with him. The evidence examined and *held* sufficient to support the judgment—(305).

Appeal from Clear Creek District Court—Hon. FLOR ASHBAUGH, Judge.

Mr. E. M. SABIN for appellant.

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Mr. JOHN J. WHITE for appellee.

Mr. JUSTICE HILL delivered the opinion of the court:

Appellee brought suit in the County Court of Clear Creek County against appellant to recover upon several causes of action; the first of which was for goods, wares and merchandise alleged to have been sold and delivered to it by him at its request. The others were for accounts assigned to him, some of which were for merchandise alleged to have been sold and delivered to the defendant, and others for work and labor performed for it, at its request. The defendant denied the allegations of the complaint. A trial to a jury resulted in a verdict and judgment for the plaintiff; the defendant appealed to the Court of Appeals, which action was later transferred to this court and the judgment reversed and the cause remanded for a new trial (41 Colo. 123).

Thereafter, on November 23, 1907, by stipulation of the attorneys in open court, the cause was set for trial December the 14th. On December the 2nd by stipulation of counsel, that order was vacated. On the 27th of the following January, by stipulation of counsel in writing, the cause was again set for trial for February 5th following, on which date the defendant, by its counsel, in open court, obtained leave to file a written traverse to plaintiff's amended affidavit in attachment. The record shows that counsel for the plaintiff appeared specially for the sole purpose of resisting this application. The record then reads:

"And, now, again, on this 5th day of February, A. D. 1908, this matter coming on for trial according to previous assignment, whereupon comes said defendant, by its attorney, E. M. Sabin, Esq., the plaintiff not appearing either in person or by his attorney, whereupon, on motion of said defendant—

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It is ordered by the court that this cause be and the same is hereby dismissed at the costs of the said plaintiff to be taxed.

And the attachment herein released and let execution issue."

Following this, on the same date, the record reads:

"And now again on this 5th day of February, A. D. 1908, come the said parties by their respective attorneys—And thereupon this cause coming on to be heard upon the motion of said plaintiff to set aside the judgment herein and for a new trial of this cause is argued by counsel, and the court being now sufficiently advised in the premises doth deny said motion."

On the same date the plaintiff prayed, and was granted an appeal to the district court; bond was fixed, furnished, etc. The defendant filed the following motion in the district court:

"Comes now the defendant herein, by E. M. Sabin, Esq., its attorney, and moves the court that the above entitled cause be dismissed for the following reasons, to-wit:

1. That the court has no jurisdiction of either the parties or the subject-matter.

2. That the plaintiff had no right, power or authority to take an appeal from the county court of Clear Creek County to this court."

This motion was denied; the cause was tried to a jury, upon the pleadings as filed in the county court. The defendant, by its counsel, participated in the cross-examination of witnesses, the offering of instructions to the jury, the arguments, and had admitted in evidence certain exhibits offered and received in connection with his cross-examination of the plaintiff's witnesses, although the defendant did not offer any direct evidence upon its own behalf. The judgment was in favor of the plaintiff; the defendant appeals.

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But two assignments of error are urged. The first is, that the district court should have granted the motion to dismiss the appeal and was without jurisdiction to proceed to a trial of the cause. The appellant's contention is that no final judgment was entered in the county court and the district court acquired no jurisdiction to hear or try the case. It is urged, that the order of the county judge was interlocutory, from which no appeal would lie; that plaintiff had the right to bring another suit; that the order of dismissal in the county court was not a judgment upon the merits; that the dismissal amounts to a voluntary non-suit, from which no appeal will lie. The appellant is not in a position to urge this contention, and it is unnecessary to pass upon it. Its appearance by its motion to dismiss the appeal in the district court was not limited to that purpose, it was in the nature of a general appearance; when that motion was overruled, it continued such appearance, and, by its counsel, tried the case upon its merits, cross-examined witnesses, introduced documentary evidence, offered instructions, filed a motion for a new trial, and in all respects submitted to the jurisdiction of the court, without in any way reserving any rights by special appearance. The district court is a court of general jurisdiction, and if the appellant is correct in its contention, having failed to rely on its rights, it is precluded from contesting the jurisdiction of the district court; having once submitted itself to its jurisdiction, it cannot again challenge it at pleasure. To permit it to contend, first, that the court had no jurisdiction and thereafter to give the court jurisdiction by proceeding with the trial of the cause, and then when the judgment is ascertained to be adverse to its contention, to premit it to again raise the question of jurisdiction, would be trifling with the court. The district court has jurisdiction of appeals from the county court and of the parties in such actions generally. It

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is not claimed that the county court did not have jurisdiction of the parties to the action, nor of the subject of the controversy. Eliminating the question of the regularity of the appeal, the defendant, by its actions, elected to proceed with the trial of the cause and did so. having done so it cannot now be heard to complain and be allowed the privilege, after ascertaining the result, to elect to have the benefit of the two positions which are inconsistent with each other.—*Smith et al. v. District Court, etc.*, 4 Colo. 235; *C. C. R. Co. v. Caldwell*, 11 Colo. 545; *Schoolfield v. Brunton et al.*, 20 Colo. 139; *Cunningham v. Bostwick*, 7 Colo. App. 169; *Fairbanks, Morse & Co. v. Macleod et al.*, 8 Colo. App. 190.

The second contention pertains to the sufficiency of the evidence. It was agreed during the trial, that the record might show that if the defendant company was liable at all it was liable for the amount sued for in the complaint. The following statement was made at the time, by its counsel, "in other words, the defendant company does not dispute the amount sued for, but does dispute its liability, and admits that the defendant has not paid the accounts." The appellant contends that the question of agency was an important one, and, before the plaintiff could recover, it was necessary to establish the agency of one F. G. Bishop, who it is claimed hired the men and purchased the supplies on behalf of the company. We think this position the correct test of the rights of the plaintiff to recover, but we cannot agree with counsel that the evidence was not sufficient to establish his fact. The defendant alleged, in substance, that the work was for one Foster, instead of for the defendant company under a lease to Foster. Outside of this allegation in the answer, the record fails to disclose any evidence of Mr. Foster ever being upon this ground, or hiring any one, or having any one represent him. It fails to disclose any competent evidence of

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a lease to him and is silent as to Foster, except where his name appears in the questions and answers of the appellee's witnesses as to their knowledge of the existence of any such a lease, which they denied. The record discloses, that the man Bishop was the superintendent and manager of the appellant during a long period, and up to the time when the debts sued for in this action were made, at which time no other person, other than Bishop, was looking after the defendant's interest; that for a long period preceding this, Bishop did all the ordering of the supplies and hired all the labor, including the foreman; that after the departure of a Miss Stewart (who it appears was the secretary of the company) no other person on the ground represented the company.

Mr. Milne testified, that he furnished sundry timbers for the mines in question, which were ordered by Mr. Bishop; that he charged them to the appellant and that said company paid him for same; that after this he sold the company powder and candle, which were ordered by Bishop, charged to the company, paid for by it; that he was a resident of Empire, near where this mine is situate, and during all this period he had business with it he never knew of any one else having anything to do with it, or with its management except Bishop, and that there was nobody on the ground except Bishop, looking after the interest of the company. It was shown and admitted that the goods involved in this action and services rendered were delivered to this mine and performed on its property during the months of March and April, 1903; that the goods delivered were charged to the appellant company; that previous to this time the mine had been closed down for a year or two but started up again early in 1903, and that Mr. Bishop was then there a part of the time.

Mr. Cain testified, that he was a mine foreman and worked in this mine from January to April, 1903; that he was employed by Bishop; that he was appointed

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foreman by Bishop the latter part of February; that Mr. Bishop was his superior and he had to go to him for all orders; that he and Mr. Bishop had an understanding in reference to hiring men; that all men had to be agreeable to Mr. Bishop; that the men, whose names were mentioned in the complaint as assignors of the claims for labor, worked on the mine when he was foreman and that all but one were hired by him, this one had been hired by Mr. Bishop; that a Mr. Metcalf had been working there under a lease known as the Metcalf lease and worked a block of ground known as the second level; that he never saw a Mr. Foster around, did not remember of ever seeing his lease, and never was requested by Mr. Foster to state anything about the mine to the men and that he did not do so; that he never was instructed to put up any notice and never was instructed to notify the men of any change; that he never heard of Mr. Foster until a few days before the men quit.

A Mr. McDonough testified, that he had worked in this mine in 1900 and 1901; that during that time all orders were given by Mr. Bishop; that in January, 1903, he met a Mr. Weir in Boston (he was the president of the company); that Mr. Weir told him that he was going to work the Silver Mountain Mine and that Mr. Bishop was to be manager; that he, McDonough, returned to the mine the 17th of January and remained until the 20th of April, was employed by Mr. Bishop in the mine; that there was no change in any way in the mine indicating any different management from the time he went away until his return.

A Mr. Williams testified that a shipment of ore had been made from the mine on the 21st of April, 1903, and that a check had been made out on that date for it to the Silver Mountain Mine Company.

Mr. Milne further testified, that he had a conversation with Miss Stewart in 1898 (she was then the sec-

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retary of the company); that she told him that Bishop had authority to order supplies; that he should go to him and not come to her for orders; that after that he went to Mr. Bishop for orders.

At the commencement of the trial Mr. Bishop was called by the plaintiff for cross-examination, under the statute. This right was denied the plaintiff until his agency had first been established. When called later, he testified that he did not know whether or not he was agent for the company up to May, 1903, but that he might have been for some special purpose, did not remember.

From the record as a whole, there is a strong and unbroken line of evidence that Mr. Bishop conducted himself and acted as superintendent, manager and agent of this company from the year, 1898, down to and during the months of January, February, March, April and May of 1903, in which latter period the claims of the appellee accrued and that his actions were such that they, of necessity, had to be authorized or were known, ratified and approved by the defendant company, which received and accepted the benefits thereof.

It is a common practice to resort to facts which tend to show recognition by the principal of the alleged agent's authority.—*Higgins v. Armstrong*, 9 Colo. 38; *Un. G. M. Co. v. Rocky Mt. Nat. Bk.*, 2 Colo. 565; *Arthur v. Gard*, 3 Colo. App. 133.

The principal is bound by the acts of his agent, to the extent of his apparent authority, unless the real extent of his power be brought to the knowledge of the other party.—*State Insurance Co. v. Du Bois*, 7 Colo. App. 214.

Agency may be established by evidence of facts and circumstances from which the existence of the agency may be conclusively proved.—*Cheesman v. Nicholl*, 18 Colo. App. 174.

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Applying these tests to the case at bar with no evidence to the contrary, there is sufficient to justify the verdict of the jury. We find no prejudicial error in this respect. The judgment is affirmed.

Affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GABBERT concur.

[No. 6586.]

VENNUM V. HOLMBERG ET AL.

1. JUDGMENT VACATED—*Reinstatement on Error*—A judgment given in the district court and thereafterwards vacated, upon alleged cause shown, within the time allowed by law, will not, no abuse of discretion being shown, be reinstated on error brought—(308).

2. FOREIGN JUDGMENT—*By Confession*—A judgment entered in a court of general jurisdiction of another state, by the clerk of that court, in vacation, upon a promissory note with a power of attorney appended authorizing such confession, the note being executed in the foreign state and payable there, and the power of attorney being valid, and the judgment authorized by the laws of that state, must, when a copy of the record authenticated according to the act of congress is presented in the courts of Colorado, be accorded full faith and credit, even though the defendant was a resident of Colorado and was not served with the process—(309, 310).

Error to Pueblo District Court—Hon. J. E. RIZER, Judge.

Mr. R. A. CROSSMAN and Mr. HARRY L. KELLY for plaintiff in error.

No appearance for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

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March 17, 1905, the plaintiff in error instituted this action against the defendants in error, Holmberg and Scott; the latter was not served with process; Mr. Holmberg defends alone. The action was to recover $869.50, being the amount of a judgment previously secured by the plaintiff against the defendants, in the circuit court of Ford County, Illinois, a court of general jurisdiction of that state. The defendant, Holmberg, interposed several defenses. On motion of the plaintiff, all of his answer, except the first defense (which was a denial of the allegations of the complaint) was stricken. June 20, 1906, a trial to the court resulted in a judgment for the plaintiff. In January, 1907, Mr. Holmberg made application to have this judgment vacated and a new trial allowed on the ground of newly discovered evidence. This motion was allowed. On retrial the plaintiff offered in evidence a certified copy of the judgment rendered by the Illinois circuit court, together with copies of all pleadings, papers, records and evidence in the case, with the proper attestation of the clerk, and the seal of the court annexed, together with a certificate of the judge as to the genuineness of the signature of the clerk, and that said attestation was in due form; also the attestation of the clerk to the genuineness of the signature of the judge, and all other formalities required in order that it might be admitted as evidence in the courts of this state. On objection the court refused to admit in evidence the certified records from the Illinois court, or any part of them, and, upon motion of the defendant, Holmberg, ordered that the cause be dismissed and that the defendant recover from the plaintiff, his costs to be taxed and that execution issue, etc.

The plaintiff brings the case here for review upon error and assigns sundry errors pertaining to the ruling of the court in vacating the former judgment entered in his favor, and in sustaining the objection to

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the introduction in evidence of the Illinois record he asks that the cause be reversed and the original judgment be re-instated.

We do not think this latter request should be entertained. The judgment was vacated within the time provided by statute, upon purported cause shown, and the defendant awarded a new trial in which the plaintiff acquiesced and introduced its proof; this judgment against the plaintiff became the final judgment in the case. The vacating of a judgment and the granting of a new trial are matters largely within the discretion of the trial court, and we are not prepared to say there was an abuse of such discretion. Under these circumstances, we will limit our review to the proceeding at the trial upon which this final judgment was entered.

The defendant has made no appearance in this court and we are not advised as to his position concerning the ruling in the rejection of the record testimony offered from the Illinois court. The only information we have of his position is the substance of the objections made at the time; these are quite indefinite. They state, that the same did not properly show a good and valid judgment entered by a competent court, or a judgment entered by a court having jurisdiction over the person of the defendant, or through an appearance of attorney, or by any appearance whatever; that on the face of the certificate, the record shows that the pretended judgment is not a judgment under the laws of Illinois; that the same is not a judgment to be recognized under the comity of states, by this court, for the reason that the court had no jurisdiction to enter said judgment and the clerk pretending to enter such judgment in vacation had no authority to enter the same; that it appears from said record that the circuit court of Ford County, Illinois, did not have jurisdiction over this defendant, to enter such judgment.

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The record proof offered shows that the judgment was entered upon a note dated at Bloomington, Illinois, March 11, 1904, executed by the defendants, made payable and delivered to Wm. R. White Company, an Illinois corporation. This note was what is commonly known as a judgment note containing a power of attorney authorizing any attorney of any court of record to appear for the makers thereof, in term time or vacation, at any time after date, and without process, to confess judgment in favor of the legal holder of the note.

This record further discloses, that the judgment was entered in vacation, by the clerk, upon this judgment note providing therefor; that an attorney of that court appeared, waived service of process, and in other respects complied with the conditions of the power contained in the note. The execution of the note, by the defendants, was established in the manner provided by the laws of Illinois, and all other matters required in case of a resident debtor were complied with; so that the only two contentions contained in the objections of defendant, as we gather from the record, are the entry of the judgment during the vacation period, and the fact that the defendants were non-residents of the state, and presumably beyond its boundaries and residing within the state of Colorado at the time the suit was instituted and the judgment rendered, and that no personal service was made upon them.

The first contention has repeatedly been passed upon by the Supreme Court of Illinois, and the validity of such note is expessly recognized by statute in that state.

In the case of *Little et al. v. Dyer,* 138 Ill. 272, the Court said:

"* * * the judgments provided for in the section are such as can be entered indifferently, 'either in term time or vacation,' and the authority to enter the judgments by confession is just as broadly given to

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the clerk acting in vacation as it is to the court acting in term time."

In *Thomas v. Mueller et al.*, 106 Ill., at page 43, the Court says:

"* * * Although the confession was entered under the statute by the clerk, as it was authorized by the statute, we must presume it is regular, unless shown not to be by the files in the case, or otherwise."

In *Joliet, etc. Co. v. Ingalls*, 23 Ill. App., at page 50, the Court says:

"All that is required, however, in order to impose upon the clerk the duty to enter up the judgment by confession in vacation, is that the papers filed with him make out a *prima facie* case; and such judgment will be presumed to be regular unless shown not to be so by the files in the case or otherwise."

To the same effect are: *Keith v. Kellogg*, 97 Ill. 147; *Coe v. Hallam*, 173 Ill. 461; *Blake v. State Bank of Freeport*, 178 Ill. 182.

The other objection to the admission of this offered proof must pertain to the right of the Illinois court to enter a judgment upon a judgment note against a non-resident defendant who was not served with process. There is nothing in this contention. The record offered shows, that this note bears date at Bloomington, Illinois, payable there; that the power of attorney authorizes the confession of judgment in any court of record.

The validity of a judgment note is recognized in the courts of the state of Illinois, as well as this state.—*Cross et al. v. Moffat*, 11 Colo. 210. The fact that the defendant was a non-resident of the state in which the note was executed and made payable, is no defense to the entering, by confession, of a judgment thereon in the state of its execution and where it was to be paid. As we view it, the record offered shows a valid judgment under the laws of Illinois, and was properly authenticated as provided by the acts of Congress, as well

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as by our statutes, and until otherwise properly impeached, was entitled to be given such faith and credit as it had by law or usage in the courts of the state in which it was rendered, and the court erred in refusing to admit it as evidence.

For the reasons stated the judgment is reversed and the cause remanded for a new trial.

Reversed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GABBERT concur.

[No. 6612.]

SMITH v. WOODWARD.

CONTRACTS—*Construction—Joint and Several*—If a contract executed by several is in terms joint only, it must be valid and enforceable as to all, in order to the several liability of any—(312).

No particular form of words is required to render a contract joint, or joint and several. The intent of the parties governs—(312).

Defendant and another, being proprietors of two drug stores, sold the stock and good will of each to the plaintiff, and agreed in writing "not to go into the drug business as clerks or proprietors" within five blocks of either store. It was *held* that inasmuch as, acting as clerks they must necessarily act separately, so that, to this extent, a several obligation was apparent, and as the injury to the plaintiff would be the same, whether they acted as clerks or proprietors, the contract must be held both joint and several as to both capacities—(312, 313).

Appeal from Denver District Court—HON. GREELEY W. WHITFORD, Judge.

Mr. EZRA KEELER and Mr. ROBERT GIVEN for appellant.

Mr. WILLIAM E. FOLEY for appellee.

Mr. JUSTICE WHITE delivered the opinion of the court:

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W. H. Smith and P. L. Steadman were the owners of two drug stores located respectively at No. 2200 and No. 2800 Downing avenue in the city of Denver. November 17, 1904, they sold both the stores, together with the good will of the business, to W. M. Woodward. A bill of sale was given the purchaser, signed by the sellers individually, in which reference was made to the drug stores as "belonging to us and now in our possession." One of the drug stores was known and described in the bill of sale as the "Steadman Pharmacy," and the other as the "Prescription Pharmacy."

Simultaneously with the sale, and as a part of the transaction, the sellers agreed in writing, signed in their individual names, not to engage in the drug business for a term of five years "either as clerks or proprietors within 5 blocks of either store, without paying to Woodward the sum of $1,000." In April, 1907, before the expiration of the five year limit, W. H. Smith engaged, as proprietor, in the general drug business within the restricted district. Thereupon Woodward sued him and recovered judgment for the sum designated in the agreement. From that judgment Smith prosecutes this appeal.

Appellant contends, that the agreement not to engage in business for the designated time within the restricted district, did not include the acts of the covenantors severally, but only jointly; and that the allegation and proof that W. H. Smith engaged in the drug business within the restricted district, constitutes no proof of a breach of the contract.

It is elementary that, if parties contract jointly only, there must be a joint liability enforcible against all, in order that there may be a several liability enforceable against any. *Bennett v. Morse*, 6 Colo. App. 122. However, it is equally elementary that no particular language or phraseology is necessary to make a con-

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tract joint, or joint and several. In all cases the true intent of the parties, when ascertained, governs. *Servant v. McCampbell,* 46 Colo. 292, 301. In the ascertainment of the intent, regard must be had to the whole instrument in the light of the facts and circumstances to which it relates; and "when the agreement, so considered, reveals some obvious absurdity, or some repugnance or inconsistency with such manifest intention, then, to avoid such consequences, but no further, the meaning of the particular words employed may be modified, extended or abridged." *Gibbons v. Grinsel,* 79 Wis. 365, 369.

Applying these rules of construction to the covenant under consideration, we are of the opinion that it was the intent of the parties thereto to restrict P. L. Steadman and W. H. Smith from engaging in the drug business in any capacity, whereby they jointly or individually might draw away from appellee the trade and good will of the very business they had sold to him. Steadman and Smith had, within the restricted district, been engaged in the drug business for many years, and, by reason thereof, it is proper to presume, had an extensive acquaintance therein. This would necessarily give each of them a decided advantage in competition with the appellee, and would likewise give any employer of either a like advantage. Realizing this, the parties evidently designed to restrict all competition by the covenantors, jointly and severally, with the appellee in the drug business in the particular district. This is evident from the words, "We agree not to go in the drug business either as clerks or proprietors" found in the contract. The duties of a clerkship are necessarily several, and, in that respect, at least, the contract expressly shows a several obligation. Under these circumstances, it is not reasonable to believe that the intent of the parties was to bind Steadman and Smith jointly, not to engage in the drug business within the

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restricted district as proprietors, and severally as clerks, and leave them free to severally, as proprietors, engage therein. Presumably the damage resulting to appellee, by reason of either Steadman or Smith engaging in the drug business as a clerk, would not be as great as that resulting from either of them engaging therein as proprietor. We will not presume that such obvious absurdity was intended by the parties, when we can, with equal propriety, ascribe a meaning to the language used that will effectuate the manifest intent of the contracting parties as disclosed by all the facts and circumstances attending the transaction.

The following authorities are somewhat similar in facts, clearly analogous in principle, and support the rules we have here applied.—*Hubbard v. Miller et al.*, 27 Mich. 15; *U. S. C. Co. v. Wm. Wall's Sons R. Co.*, 35 N. Y. Supp. 978.

The judgment is, therefore, affirmed.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE BAILEY concur.

[No. 6633.]

SELFRIDGE ET AL. v. LEONARD-HEFFNER COMPANY.

1. JURY—*Trial by—Equity Causes*—In an equity cause neither party is entitled to a trial by jury. If in such a cause a jury is empannelled, the court may of its own motion, after evidence has been heard, discharge the jury and make its own finding—(316).

2. MECHANICS LIENS—*A Proceeding in Equity*—An action to foreclose a mechanics lien is equitable in its nature and controlled by the rules of chancery practice—(316).

3. ——*Cross Complaint Demanding Damages*, for the violation of the contract upon which plaintiff's action is grounded does not change the character of the action to one at law—(316).

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4. APPEALS—*Harmless Error*—The admissibility of evidence for the plaintiff in a cause tried without a jury will not be considered on an appeal by the defendant, where, irrespective of such evidence, sufficient is found in the record to support the judgment—(316).

Appeal from Boulder District Court—HON. JAMES E. GARRIGUES, Judge.

Messrs. MONTGOMERY & INGRAM, and Miss ELIZABETH M. BROWN for appellants.

Mr. JOHN R. WOLFF for appellee.

Mr. JUSTICE WHITE delivered the opinion of the court:

Appellee, as plaintiff in the court below, sued appellants, as defendants, to foreclose a mechanic's lien upon a certain mill-site, and a lode mining claim, situated in Boulder County. The lien claimed was for the purchase price of machinery, materials, supplies and equipment used in the construction of a water power plant and air compressor. The principal defense interposed was set forth in a cross-complaint, wherein it was alleged that defendants were substantially damaged, in that the power plant and air compressor were not constructed according to agreement, and that the materials and equipment furnished and used therein were not of the kind, quality and efficiency agreed upon by the parties. A jury was called, but during the taking of testimony, or at the close of the evidence, was discharged, and the court thereafter made special findings of fact in favor of plaintiff and declared "that the allegations of defendants' answer are not sustained by the evidence; that the material allegations of the complaint are true," and gave judgment accordingly establishing the lien on the mill-site. From the judgment and decree the defendants prosecute this appeal.

Upon the material issues of the case, the evidence

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was conflicting. Appellants, therefore, contend that the action of the court in withdrawing the case from the consideration of the jury, constitutes reversible error.

In a law case, if there is evidence which tends to establish the plaintiff's cause of action and the defendant's defense, sufficient, if uncontroverted, to sustain the allegations of each party, it is error for the court to withdraw the case from the consideration of the jury, or to direct a verdict therein. In such cases it is not for the court to determine or pass upon the sufficiency of the evidence, as that duty rests solely upon the jury.

This rule, however, does not apply in equity cases. Neither party is entitled to a jury trial therein as a matter of right. The court upon its own motion, may, in such cases, invoke the aid of a jury in determining specific questions of fact; and it may, before those questions are so determined, or afterwards, dispense with the jury, or disregard its report and make its own findings of fact.—*Peck et al. v. Farnham,* 24 Colo. 141; *Kellogg v. Kellogg,* 21 Colo. 181, 183; *Saint v. Guerrerio,* 17 Colo. 448; *Kirtley v. Marshall S. M. Co.,* 8 Colo. 279.

Proceedings to foreclose mechanics' liens are in their nature equitable, and are necessarily governed by the rules pertaining to chancery practice.—*Williams v. Uncompahgre C. Co.,* 13 Colo. 469, 478; *San Juan & St. L. M. & S. Co. v. Finch,* 6 Colo. 214, 218; *Bradbury & Co. v. Butler & Son,* 1 Colo. App. 430, 433.

The fact that the answer or cross-complaint sought to recover damages, does not change the cause of action as set forth in, and determined by, the complaint. The action therein stated was in equity, and remained such throughout the trial, notwithstanding the character of the answer. When a court of equity acquires jurisdiction of a cause, it has jurisdiction thereof for the purpose of determining the rights of the parties growing

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out of the controversy, notwithstanding some of the matters involved might properly be determined in an action at law.—*Cree v. Lewis*, 49 Colo. 186; 112 Pac. 326; *Nelson v. First Nat. Bk.*, 8 Colo. App. 531, 534.

A witness, who was a dealer in the class of machinery sold to defendants, was permitted, as an expert, to testify as to the capacity of the power plant and air compressor in controversy, and the amount of horse power necessary to run the same, and also that the plant and machinery greatly enhanced the value of the mill-site on which it was placed. As the cause was properly determined by the court, without the intervention of a jury, and there was sufficient evidence to support the conclusions, irrespective of that of which complaint is made, it is unnecessary to consider the admissibility or non-admissibility of the evidence in question.

We do not deem it necessary to notice other objections urged. There was sufficient, relevant and material evidence to support the findings, and the judgment is, therefore, affirmed.

Judgment affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

[No. 6930.]

HAINES, EXECUTOR, v. FEARNLEY ET AL.

1. WATER RIGHTS—*Proceeding to Adjudicate Priorities*—The proceeding under the statute (Rev. Stat. c. 72 Art. IV) to adjudicate priorities, is a special proceeding, and not a civil action under the code—(319).

2. ——*Appeals—Must Conform to Statute*—One appealing from an order made in such proceeeding must follow the provisions of the statute even though his complaint is directed not to any award of priority to the use of water, but to a clause

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of the decree assuming to establish in the owner of a certain ditch a way over private lands of the appellant—(319, 320).

An appeal attempted without reference to these provisions, but under the provisions of the code must be dismissed—(321).

Appeal from Douglas District Court—HON. JAMES OWEN, Judge.

Messrs. THOMAS, BRYANT, NYE and MALBURN for appellants.

Mr. GEORGE F. DUNKLEE and Mr. O. E. JACKSON for appellees.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court:

This is an attempted appeal from one clause of a final decree which was rendered by the district court of Douglas County in the special statutory proceeding which has been provided by our general assembly for the determination of priorities of right to the use of water for irrigation. Appellees move to dismiss the appeal upon the ground that appellant failed to comply with the essential and mandatory provisions of the statute relating to the taking and perfecting of appeals.

In this statutory poceeding the district court made a final decree awarding priorities to the respective ditches which were parties thereto. Appellant was not, and is not now, the owner, or representative, of any ditch to which a priority was awarded, and was not, and is not, a consumer of water from any of such ditches. He was not made a party to the proceeding and, it seems, did not appear therein until after final decree was rendered. The clause of the decree to which appellant objects does not concern the award of priorities, but affects only a tract of his land over which the appellees' ditch runs, and to which ditch a priority was awarded. In that subdivision of the general decree which constitutes the award of priority to appellees'

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ditch was the objectionable clause, and it purports to establish in the owner of the ditch a right of way over and across a tract of appellant's land. Ascertaining this, appellant voluntarily appeared after the rendition of the final decree and objected thereto, but his objection was overruled. Within the two years' statutory limit for a review appellant again appeared in that special proceeding and filed his petition, asking the court to vacate, correct or modify the objectionable clause, and it seems that additional testimony was taken upon the controverted issue and the court made findings against petitioner, appellant here, and denied the prayer of his petition. It is this order refusing to grant appellant's petition that he seeks by this appeal to set aside. As the point is not raised or discussed, we do not pause to inquire if this is such an order as is, in any event, reviewable by appeal or writ of error, though we have decisions thereon, but we pass at once to a consideration of the questions argued by counsel.

These statutes, which are the authority for the district court, and under them it was acting, to ascertain the priorities of right to the use of water for irrigation, furnish a complete procedure for such purpose. The proceeding is not a civil action under the code, but a special proceeding under the Statute. The method of review by the supreme court of final decrees therein is particularly prescribed. An appeal is the creature of statute. Unless authorized thereby, it does not exist, and if the statute provides for a direct review of final judgments or decrees therein, the remedy designated is the only one available. The method given by these statutes is an appeal, which this court has repeatedly held to be exclusive. The manner of taking and perfecting the appeal is essentially different from that under the Code of Civil Procedure and the provisions of the statute applicable thereto we have, time and again, held to be mandatory and jurisdictional; that the

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parties to an appeal cannot waive compliance therewith, or, disregarding them, by consent confer jurisdiction upon the supreme court to entertain an appeal. Appellant, having failed to comply therewith, his appeal must be dismissed.—*Napier et al. v. Glenwood Light & Water Company,* 49 Colo. 208; 112 Pac. Rep. 323.

Appellant, however, while conceding what we have already said as applicable to an appeal from a final decree which adjudicates among the various ditches their relative priorities of right, contends, nevertheless, that the appeal attempted here is not within the purview of the statute, because appellant is not dissatisfied with, or seeking a review of, an adjudication of any priority of water right, but merely complains and seeks a review of one clause of the general decree which denied his petition wherein he sought to have a modification or correction thereof, and which clause, though rendered in the statutory proceeding, affects only a right of way over his lands for appellees' ditch, to which an award of priority had been made.

This reasoning, while plausible, is fallacious. It may be that the findings and decree of the district court which purport to grant a right of way for appellees' ditch over appellant's land are erroneous, as being contrary to the evidence, or as outside of the issues and not within the contemplation of these adjudication statutes. And, if so, it may be that appellant, not having originally been a party to the proceeding, would not be affected by the decree. And it may also be true, unless by voluntarily appearing he has waived his right to be heard, that the court was without jurisdiction, and that the decree as to him could not be enforced, concerning all of which we express no opinion. However that may be, it is entirely clear that appellant has mistaken his remedy. He has intentionally disregarded the provisions of the statute which

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relate to appeals, because he says they are not applicable, and has sought to perfect an appeal under our code of Civil Procedure. If, as appellant contends, the district court in this special proceeding, was without jurisdiction to determine an issue affecting a right of way over his lands, nevertheless the court in this very proceeding made such determination. Even if the determination was wrong, as being contrary to the evidence, or not within the issues, the decree itself was made in the special stautory proceeding, and not in a civil action under the code. That being true, one affected by any part of a decree in such proceeding, if he desires to appeal therefrom, must conform to the provisions of the special statute relating to appeals, and, not having done so, his appeal must be dismissed.

It requires no citation of authority to establish the proposition that the provisions relating to appeals in our civil code apply only to civil actions. Where a statute provides a special proceeding and prescribes the practice to be observed therein, the provisions of the civil code, unless adopted thereby, are not applicable, but the procedure that is prescribed by the special statute is exclusive. If the matters attempted to be litigated, we repeat, were such only as could properly be litigated in a civil action, appellant did not select his remedy under the code, but voluntarily sought relief in the special proceeding itself. He must be held to his election, and, if he is dissatisfied with any clause of the decree below, if he desires to have it directly reviewed and if it is reviewable at all, he must proceed in accordance with the proceeding prescribed by the special statute and not by the civil code. What remedy, if any, appellant may have to protect his asserted rights as against the clause of the decree herein attacked we need not determine. That such right or remedy, if any, may not be lost, this appeal will be dismissed without prejudice, and it is so ordered.

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Appeal dismissed without prejudice.

Mr. JUSTICE WHITE and Mr. JUSTICE BAILEY concur.

[No. 6977.]

HACKETT v. THE LARIMER AND WELD IRRIGATION CO.

Judgment of district court affirmed on the authority of Hackett v. Larimer and Weld Co., 48 Colo. 178.

Appeal from Larimer District Court—HON. JAMES E. GARRIGUES, Judge.

Mr. T. J. LEFTWICH and Mr. NEWTON W. CROSE for appellants.

Mr. L. R. RHODES for appellee.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court:

By stipulation of counsel of respective parties, this cause was submitted for final decision upon copies of the briefs filed and used in the case of *Hackett et al. v. Larimer and Weld Reservoir Company*, 48 Colo. 178; 109 Pac. 965. It appears from this stipulation and from the record that the parties, and the questions involved in the two actions are, in principle, the same. The judgment of affirmance in that case requires like action in this. Upon the authority of that decision, therefore, the judgment in this case is affirmed.

Affirmed.

Mr. JUSTICE WHITE and Mr. JUSTICE BAILEY concur.

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[No. 7260.]

TROZZO v. THE PEOPLE.
DOE v. THE PEOPLE.

1. CONSTITUTIONAL LAW—*Requirements in Legislation*—The section of the constitution relating to the title of bills (Sec. 21 Art. V.) must receive a reasonable construction. If the bill treats of but one general subject, and that is expressed in the title, this is sufficient—(326).

The penalties prescribed for the violation of a statute are germane to so much of it as defines and denounces the crime, and need not be referred to in the title; but a title which by general words refers to the crime, and then to the punishment thereof, as by the phrase "and providing punishments," etc., is not within the prohibition of the constitution—(326).

The title "An act concerning certain forms of prostitution and providing punishments for persons encouraging prostitution in violation of this act" (Laws 1909 c. 196) contains but one subject and is not open to objection—(328).

2. CRIMINAL LAW—*Consolidation of Indictments*—Two indictments were pending against different defendants for the violation of the same section of the same statute; the crimes charged were committed at the same time and place, as disclosed by the record, and the facts as to the two were intermingled the one with the other. They were properly consolidated under the statute (Rev. Stat. sec. 1953, Mills Stat. sec. 1452)—(329).

3. EVIDENCE—*Bias of Witness*—An accused person is entitled to show an unfriendly disposition on the part of a witness for the prosecution, and threats made by such witness against him. The exclusion of such evidence is error. That the witness whose animus is so in question is declared by the trial judge, in refusing a new trial, to have disclosed by her acts and demeanor on the stand, the malignity attributed to her is not sufficient, on error brought, to warrant affirmation of the conviction. The demeanor of the witness cannot be presented in the record, and it is not to be said that the jurors and the trial judge were of the same mind as to the matter—(330. 331).

The error was aggravated by afterwards permitting the prosecution to show the friendly disposition towards the accused of a witness sworn in his behalf—(332).

4. CRIMINAL LAW—*Statute Construed*—The statute (Laws 1909 c. 196 Sec. 2) declares that "any male person * * * who shall engage or assist in operating or managing" any house,

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&c., for the purpose of carrying on prostitution, shall be deemed guilty of felony. *Held*, that in order to a conviction it must be shown that the accused had control of and conducted, or assisted in the management of the affairs of the house, so as to be in some manner responsible for the immoral practices there carried on; or must at least have been so in control as to be able to bring about, or assist in bringing about, such immoral practices; that to merely aid, abet, advise, or encourage another in the conduct of the house is not within the statute, and that to so construe it was to read into it the descriptive elements of an accessory, and so enlarge it by construction.

The statute declared that "any person * * * who shall knowingly live on or be supported in whole or in part by the money or other valuable consideration realized, procured or earned by any female person through the prostitution of any other female" shall be deemed guilty of felony.

Held, that there could be no conviction where the proceeds of prostitution were received by the accused, knowingly, from the keeper of a brothel to pay a debt due him, or redeem a pledge for her, or where he had received such moneys, received by the brothel-keeper as the proceeds of another woman's prostitution, without anything done, or consideration parted with by the brothel-keeper, nor where the accused had received such proceeds of prostitution for a different purpose, and had afterwards applied a part of it to his own maintenance—(334-337).

5. ——*Instructions*—In the trial of one charged as a principal the statutory provisions as to accessories have no application, and the instruction should be limited accordingly—(338, 339).

Error to Pueblo District Court—HON. C. S. ESSEX, Judge.

Mr. M. G. SAUNDERS for plaintiff in error.

HON. BENJAMIN GRIFFITH, attorney general, Mr. CHARLES O'CONNOR, assistant attorney general, Mr. JOHN T. BARNETT and Mr. EUGENE A. MORAN for the people.

Mr. JUSTICE HILL delivered the opinion of the court:

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The plaintiff in error was tried upon two indictments; each charged a separate offense; both were for the violation of an act entitled "An act concerning certain forms of prostitution and providing punishment for persons encouraging prostitution in violation of this act." Approved April 26, 1909. The first indictment, in substance, charges him with feloniously engaging and assisting in operating and managing a certain house for the purpose of carrying on prostitution; the second, with feloniously and knowingly living on, and being supported, in part, by the money and other valuable considerations realized, procured and earned by one Winnie Stevens, a female person, through the prostitution of one Blanche Bennett, another female person. By proper motion to quash the indictments, the constitutionality of this act was challenged. This motion was overruled. On motion of the District Attorney, over the objections of the defendant, the causes were consolidated for trial; the defendant was convicted upon both indictments and brings the causes here for review upon error.

Four groups of assignments of error are urged; as some of them necessitate a reversal of the judgment, in view of a new trial it is proper to consider them all; this will be done in the order presented.

It is urged that this act contravenes section 21 of article 5 of the state constitution, in that its title contains more than one subject of legislation and that various subjects in the act are not expressed in the title. A very able and ingenious argument has been presented in support of this position. This section of the constitution reads:

"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be

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expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

From this language it will be observed, that, to dispose of the defendant's contentions it is only necessary to consider: First, does the title contain but one general subject? Second, does the act contain a subject which is clearly expressed in the title? And third, do the charges made against the defendant come within the provision of the one subject which is clearly expressed in the title?

This section of the constitution has been before this court for consideration in several cases where it was claimed its provisions were violated. At first glance several subjects usually appear to be mentioned in the titles of a great many acts, but, as said by this court in the case of *Golden Canal Co. v. Bright*, 8 Colo. 144, at page 149,

"This constitutional inhibition must receive a reasonable construction. It is enough if the bill treats of but one *general subject*, and that subject is expressed in the title."

In that case the title to the act under consideration read,

"An act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use."

It was held that this title contained but one general subject properly expressed in it, which was "to regulate the use of water for irrigation" and that the remainder of the title refers to nothing which is not germane to the subject thus expressed. We think this position is applicable here. The controlling provision of the title to the act in question is, "An Act concerning certain forms of prostitution." The rest of the title refers to nothing which is not germane to the

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subject thus expressed. The remainder which reads "and providing punishments for persons encouraging prostitution in violation of this act" is germane to the subject already expressed. The punishments provided are by necessary implication properly included in that portion of the title preceding it; had this latter portion been omitted the punishments could have been properly included in the bill under the first portion of the title. The punishment provided, for a male person over the age of eighteen, who shall feloniously engage and assist in operating or managing a house for the purpose of carrying on prostitution, or for any male or female person, over the age of eighteen, who shall knowingly live on, or be supported in whole or in part, by the money, etc. procured or earned by any female person, through the prostitution of any other female person, would certainly come under the provisions of a title which reads, "An Act concerning certain forms of prostitution" or " An Act concerning prostitution." These matters all concern prostitution or certain forms of prostitution.

In the case of *Clare v. The People*, 9 Colo. 122, the title of the act under consideration read, "An act to facilitate the recovery of ore taken by theft or trespass, to regulate sale and disposition of the same, and for the better protection of mine owners." It was held that this title contained but one general subject clearly expressed, and that the addition of sub-divisions thereof did not necessarily vitiate the whole title.

In *Brown v. Elder*, 32 Colo. 527, this court held that the inheritance tax provisions contained in the general revenue act of 1902, did not embrace separate and distinct subjects from the one expressed in the title of the act, which reads, "An act in relation to public revenue, and repealing all previous acts or parts of acts in conflict therewith." It was further held that this title was sufficiently broad to include all the

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provisions concerning the inheritance tax and was not so general as to be misleading.

In *Re Breene*, 14 Colo. at page 405, in commenting upon this section, this court said,

"* * * The general assembly may, within reason, make the title of a bill as comprehensive as it chooses, and thus cover legislation relating to many minor but associated matters. For example, an act entitled 'An act in relation to municipal corporations' may provide for the organization, government, powers, duties, offices and revenues of such corporations, as well as for all other matters pertaining thereto. 'The generality of a title,' says Judge Cooley, 'is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection.'"

In the case of *Anderson v. Grand Valley Irrigation District*, 35 Colo. 525, the title attempted to cover all conceivable phases pertaining to procedure involved in irrigation districts; it was held that the first clause in the title "An act to provide for the formation and government of irrigation districts" is broad and comprehensive enough to include all other provisions found in the act, and that the remainder of the title might be entirely disregarded as surplusage. When tested by the rules announced in the foregoing authorities it is clear that there is but one general subject treated in the title of the act under consideration, and that all matters contained in the charges against the defendant are included in and are a part of, the one subject, to-wit, prostitution, which is sufficiently named in the title of the act, and that the charges against this defendant come within the provisions of the act, which, in turn, are likewise covered by the title. The court committed no error in holding that the act was not subject to the constitutional objections urged.

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It is next claimed that the court erred in consolidating the cases for trial. It is claimed that the two indictments charged two separate and distinct offenses, which did not arise or grow out of the same transaction, or involve the same crime; that each required separate testimony and separate defenses. Section 1953, Rev. Stat. 1908, reads:

"Whenever there are or shall be several charges against any person or persons for the same act or transaction, or for one or more acts or transactions connected together, or for one or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases the court may order them consolidated."

While the indictments do not show it upon their faces, the district attorney stated in open court at the time they were consolidated, that the two indictments grew out of the same or connected transactions. We think the record sustains him in this respect. The crimes charged are both for the violation of the same section of the statute. They are for acts and transactions of the same class of crimes and in this case, as disclosed by the record, for acts and transactions connected, done and performed at the same time and place; the facts were intermingled; this brought them within the provisions of this act. The court was justified in ordering their consolidation for the purpose of a trial, and the defendant was in no respect prejudiced thereby.—*Cummins v. The People*, 4 Colo. App. 71; *Bergdahl v. The People*, 27 Colo. 302; *Roland v. The People*, 23 Colo. 283; *Short v. The People*, 27 Colo. 175; *Chestnut v. The People*, 21 Colo. 512.

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The third contention pertains to the rejection of testimony. Upon cross-examination the witness Blanche Bennett was asked, in substance, if she had not had a conversation with Pete Ferrone, in the city, at the corner of River and Kelly Streets, at a time about two weeks after the arrest of the defendant Blackie, wherein she said if Blackie had gone on her bond she would not have said anything against him, that he had not treated her right, she had it in for him and that she intended to give him a roughing. These questions were objected to by the district attorney. Counsel for the defendant stated that the purpose for which it was offered was to show the animus of the witness in the prosecution. The objection was sustained upon the ground of immateriality. Subsequently the defendant recalled the witness Pete Ferrone, and asked him as to having had this conversation with the witness Blanche Bennett at the time and place named in the question to her. An objection to this question was also sustained. Later the People recalled their witness, Annie Muldrow, and she was allowed to testify that she had had a conversation with the defendant's witness Winnie Stevens shortly after the arrest of the defendant, at her house. The witness said that Winnie Stevens told her that if Blanche Bennett turned up Blackie to the authorities she would choke her and make her leave town. The witness Blanche Bennett was the main witness for the state. Without her testimony no conviction could have been sustained. Winnie Stevens was the principal witness upon behalf of the defendant. A defendant has the right to show the animus of the people's witness and their interest and motives, if any such exist, in testifying against him. The jury have the right to know, and should consider, any motives which a witness may have. And if it could have been shown, that the testimony of the witness Bennett was actuated by mo-

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tives of revenge against the defendant; that she believed that he had not treated her right; that she had it in for him, and had declared it to be her intention to give him a roughing, the defendant had the right to have this fact placed before the jury. In Vol. 3 Ency. of Evidence, p. 771, it is said, "Unfriendliness to the party against whom the witness is testifying may be shown on cross-examination and taken into account by the jury."

In overruling the motion for a new trial, the learned trial judge admits technical error in excluding this evidence, but argues that the manner of the witness on the stand, the very bitterness of her words, the manner in which she spoke them, her sarcasm and irony, the tone of her voice and her very demeanor both on and off the stand, in the presence of the jury, told them, as plainly as if expressed in words, of her undying hatred of the man whom she says took her money, leaving her but a pittance to live on. This may all be true, yet we do not think it sufficient justification for the rejection of competent evidence. The demeanor and actions of a witness are not embodied in the record, and there might be a difference in the mind of the trial judge and the minds of the jurors as to the effect of such demeanor and actions; the jury being the sole judges of the evidence it is improper for the court to refuse its admission, when competent, because it would be but cumulative to a material fact which, in his opinion, had already been established solely by the actions and demeanor of the witness. Also, by this ruling, the jury might have been mislead as to the law on this subject and, on account of the rejection of this evidence, assumed that it was immaterial and unnecessary, in weighing the testimony of the witness, to consider any feelings of animosity, bias or prejudice which she might have entertained against the defendant. The refusal of this

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testimony was specially prejudicial against the defendant for the reason, that following its rejection, the state's witness was allowed to answer similar questions to show the friendliness and motives of the defendant's witness, Winnie Stevens, who had testified upon his behalf. From these facts the jury might have inferred that it was proper to consider the friendliness toward the defendant of a witness called upon his behalf, yet immaterial and unnecessary to consider the enmity against him of a witness called upon behalf of the state. For these reasons the rejection of this testimony cannot be held to be harmless error, because the trial judge may have thought that the same facts attempted to be shown were demonstrated by the actions and demeanor of the witness. It would be a dangerous precedent to allow this line of reasoning to be used as an excuse for the rejection of competent evidence in a criminal case, even where the crimes charged are of such a low and degrading nature as those alleged in these indictments.

The fourth complaint is to the giving of instruction No. 6, which reads:

"The court further instructs you that if you believe from the evidence that the defendant was not in fact the manager of such house of prostitution, but that the same was operated, managed and conducted by the witness Winnie Stevens, or by her and the witness Blanche Bennett jointly, and if you should further believe and find from the evidence beyond a reasonable doubt that the defendant in any manner did aid, abet, assist, advise or encourage the said Winnie Stevens or Blanche Bennett, or either, in the management, conduct or operation thereof, such fact and finding would bring him within the purview of the law under said first mentioned indictment; and in passing upon such facts you may take into considera-

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tion the acquaintance, association, relations, business and otherwise, then existing between the defendant and the said Winnie Stevens, as the same is shown by the evidence, the taking and accompanying of men to the said house of prostitution, and the purposes thereof, if shown by the evidence, the receipt of money from the inmates thereof, if the same has been shown, together with all other facts and circumstances shown in evidence."

The portion particularly objected to is, as follows:

"* * * if you should further believe and find from the evidence beyond a reasonable doubt that the defendant in any manner did aid, abet, assist, advise or encourage the said Winnie Stevens or Blanche Bennett, or either, in the management, conduct or operation thereof, such fact and finding would bring him within the purview of the law."

The portion of the statute which it is claimed justifies the giving of this portion of this instruction reads, "or who shall engage or assist in operating or managing any rooming house or building for the purpose of carrying on prostitution." It will be observed that the words "aid," "abet," "advise," "encourage," "in the conduct * * thereof" are not contained in the statute. This language usually applies to accessories, and in the sense used in this instruction is broader and goes beyond the provisions of the act. In this act certain agents are made principals by the statute itself. The act points out and makes principal offenders of certain persons, who, ordinarily, would be punishable as accessories to crime with punishments less severe, as this portion of the act reads, the male person to be convicted under its provisions must "engage or assist in operating or managing."

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In *Re Consolidation of School Districts*, 23 Colo., in commenting upon the word "management" at page 502, this court said:

"Webster defines the word 'management' to be 'the act or art of managing; the manner of treating, directing, carrying on or using for a purpose; conduct; administration; guidance; control; as, the management of a farm, the management of state affairs.' From this it will be seen that the word is one of comprehensive meaning."

In the case of *McChesney v. Village of Hyde* Park, 37 N. E. (Ill.) 858, it is said:

"* * * Webster defines the word 'operate' as meaning 'to put into or to continue in operation or activity;' 'to work, as to operate a machine.'"

To the same effect is the case of *Nagel v. Mo. Pac. Ry. Co.*, 75 Mo. 653.

In the case of *City of Little Rock v. Parish*, 36 Ark. at page 174, it is said:

"Operation means, 'exertion of power,' 'method of working;' 'process of operating;' 'mode of action.'"

In *Commonwealth v. Johnson*, 22 Atl. (Pa.) at page 704, it is said:

"Ordinarily the term 'manager' means 'one who has the conduct or direction of anything; as the manager of a theater; the manager of a lottery, of a ball,' etc. * * 'Manage' means 'to direct, control, govern, administer, oversee.'"

In *Cameron v. Kenyon-Connell Commercial Co.*, 56 Pac. (Mont.) 358, it is said, "Management usually signifies positive, rather than negative, conduct."

In *Florsheim Bros. Dry-Goods Co. v. Lester*, 29 S. W. Ark.) 34, it is said,

"* * The meaning of the phrase, 'to carry on,' when applied to business, is well settled. In Worcester's Dictionary the definition is: 'to prosecute, to

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help forward, to continue; as to carry on business, etc.' "

In *State v. Tolman,* 31 So. (La.), at page 322, it is said,

"* * The constant daily repetition by the same person of the same kind of acts, each act bringing with it a money return, is certainly the carrying on by him of business in that particular line."

In *Abel v. State,* 8 So. (Ala.) 760, it is said:

"* * To 'engage in or carry on business' has been uniformly construed as signifying 'that which occupies the time, attention and labor of men, for the purpose of a livelihood or profit.' "

In the case of *State v. Napier,* 41 S. E. (S. C.) 13, it is held, in substance, that the words, "the carrying on of a business or the plying of a vocation" necessarily involve the idea of successive acts, continuity of habit,—and that the proof of a single act of hiring or soliciting a laborer to be employed beyond the state limits would not, of itself, constitute the offense of carrying on the business of an employment agent.

We see nothing in the context or any part of this act that makes it clearly appear that the words or terms "operating or managing," used in Section 2, were intended to be applied differently from their ordinary terms or legal acceptation, and from the definitions above given, it follows that the instructions should have stated that in order to convict, the evidence must show that the defendant came within the provisions of the statue. To do this it must show that he had control of and conducted or assisted in the management and operation of the affairs of the house in some manner to be responsible for the acts of prostitution committed therein, or he must, at least, have been able to bring about or assist in bringing about such prostitution. But the court told the jury that

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although Winnie Stevens had the sole management and control of the house, or that she and Blanche Bennet jointly had such (thereby excluding all ideas of any assistant in the management and conduct of the house,) that if the defendant did, in any manner, aid, abet, assist, advise and encourage either of them, under either circumstances it was their duty to convict. The words "in any manner aid, abet, assist, advise or encourage," are very broad and sufficient to include many people for the doing of many things, and by this instruction it appears to us that the court read into the act the necessary descriptive elements of an accessory which amounted to an enlargement of the scope of the statute by construction.

In *City of Denver v. Domedian,* 15 Colo. App. 36, it is said,

"A proper regard for the liberty of the citizen requires, before he can be convicted and punished for an alleged offense, which is not such *per se,* but made so only by statute, that the offense be described with such particularity and certainty that it may be understood by one of reasonable intelligence to be prohibited, without a resort to extreme technical legal rules of construction."

It will be observed that the statute does not attempt to make it a felony for a female person to manage or operate, or assist in the management or operation of a house of prostitution, this offense is only punishable as a misdemeanor, section 1776, Rev. Stat. 1908, hence, a female accessory to a female operator of such an establishment would be punishable for a misdemeanor, but, according to this instruction, a male accessory would be guilty of a felony, while this principal would remain a misdemeanant. The higher offense provided in that portion of the act under discussion is the doing of a certain thing by a male person, to-wit, to act as an employee or

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servant in or about any room, house or place of prostitution, or to engage or assist in operating or managing any such place. Another male person assisting him in the doing of these acts could unquestionably be prosecuted as an accessory, while the female person associated is guilty only of a misdemeanor. It appears to us, although not necessary to determine, that to charge a person as being an accessory to her in the act she was doing would be to limit his punishment to the same crime as hers. As a general rule an accessory cannot be convicted of a higher offense than the principal.—12 Cyc. 195; 1 McClain on Criminal Law, p. 166.

In the case at bar the defendant is charged as principal for the doing of certain prohibited acts; the instructions should have been limited to such and within the provisions of the act the statute relative to accessories has no application to the facts here, where the acts themselves make the defendant the real and only principal.

Complaint is also made to the giving of Instruction No. 7, it reads,

"That in order to convict the defendant under the second mentioned indictment the following facts must appear from the evidence beyond a reasonable doubt:

1. That Blanche Bennett was a prostitute and earned or received money by means of or through her prostitution.

2. That the said Winnie Stevens, either directly or indirectly received, realized or procured such money, or some part thereof, from or through the said Blanche Bennett.

3. That the defendant Trozzo received or procured such money, or some part thereof, from the said Winnie Stevens, with knowledge that the same was derived through the prostitution of the said

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Blanche Bennett, and that he used the same, or some portion thereof, for his own living, maintenance, subsistence, personal expenses or support.

The amount or sum he so received, as well as the purposes for which it was given or for which he received it, are immaterial, if you should find that he used the same, or any part thereof as above set forth."

The giving of this instruction in its present form was prejudicial error. It is broader than, and goes beyond, the provisions of the act. The statute says, any male person over the age of eighteen who shall knowingly live on or be supported in whole or in part by the money or valuable consideration realized, procured or earned by any female person, through the prostitution of any other female person or persons; but the court told the jury they need only find that Blanche Bennett received money through prostitution, that Winnie Stevens either directly or indirectly received, realized or procured such money or some part of it from or through Blanche Bennett, and that the defendant received or procured some part thereof from Stevens with knowledge, etc., and used the same or some portion thereof, for his own living, maintenance, subsistence, personal expenses or support. Under this instruction, to convict, Winnie Stevens was only required to receive such money without any effort on her part, and regardless of any equivalent return, and it need not constitute a consideration as mentioned in the statute. The defendant need only passively receive some part of such money upon a single occasion, and thereafter, regardless of the purpose for which it was given him, if he bought with it an article for his own use, he was guilty of, in part living upon or being supported by the money. This is what the jury must have understood by that portion of the instruction, where it said:

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"The amount or sum he so received, as well as the purposes for which it was given or for which he received it, are immaterial, if you should find that he used the same, or any part thereof as above set forth."

This instruction eliminated from the jury the defense that the money given the defendant by Winnie Stevens was received by him in payment of debts, or to redeem jewelry for her. By this instruction the court ignored the words "earned," "procured," "realized," "consideration," "lived upon," and "supported by." The phrase "lived upon" is thus defined by Webster, "To be maintained in life; to acquire a livelihood, to subsist with, on or by, as to live on spoils, those who live by labor." Winnie Stevens testified that she never gave the defendant a dollar for his own use; his testimony was to the same effect. By this instruction the offense was not limited to the acts stated in the statute, but would cover many cases for acts which evidently were not intended to be prohibited by this statute.

Complaint is made to the giving of Instruction No. 9. When segregated from the erroneous instructions complained of and given with proper instructions upon the other subjects, we find nothing wrong with this instruction. It is likewise urged by the Attorney General that the alleged errors in instructions 6 and 7 are cured when considered in connection with the instructions given as a whole. We cannot agree with this position. We find nothing in any of the other instructions to modify, explain or ameliorate the severity of those heretofore discussed.

For the reasons stated the judgment is reversed and the cause remanded for a new trial in harmony with the views herein expressed.

Decision *en banc.* *Reversed.*

Mr. JUSTICE WHITE not participating.

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[No. 7362.]

KNUDSON V. FROST ET AL.

1. RULES OF COURT—*Effect*—The rules of this court have the effect of a statute. They are not to be ignored.

2. APPEALS—*Transcript*—Where the transcript transmitted to this court by the clerk of the court below fails to show that any appeal was granted, or any of the orders or proceedings necessary to a perfected appeal, and it does not appear that the attorney of the appellant filed with the clerk below any præcipe for such transcript, indicating what should be inserted therein, as required by rule VIII of this court, leave to withdraw the transcript, in order to its amendment, will be denied, and the appeal will be dismissed without prejudice.

Appeal from Logan District Court—Hon. H. P. BURKE, Judge.

Mr. J. W. MCCREERY and Messrs. MCCONLEY & HINKLEY for appellant.

Messrs. MUNSON & MUNSON for appellees.

CHIEF JUSTICE CAMPBELL delivered the opinion of the court:

The transcript lodged here contains none of the so-called appealable orders. It does not show that an appeal was prayed or granted, or that the amount of the appeal bond was fixed, or that the clerk was authorized to approve it. Indeed, the record is barren of any orders or matters which are essential to the right of the complaining party to be heard upon an appeal in this court. The appellant does not claim otherwise. On the other hand he confesses the motion and asks leave to withdraw the transcript, heretofore filed, for an amendment, suggesting an omission, and claims that the record of the court below shows that essential orders, absent from this transcript, were, in fact, made by the trial court.

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The only thing for decision is whether leave to make the desired amendment should be granted, or whether the motion to dismiss the appeal should be sustained. Rule VIII of this court reads: "Clerks of inferior courts in making up an authenticated copy of the record in civil cases shall certify to this court so much of the record, arranged in chronological order, as the appellant or plaintiff in error may, by *praecipe*, indicate." The rules of the court have the force and effect of a statute. They are made to be observed, not to be ignored. If an appellant or plaintiff in error chooses to delegate to the clerk of the court the preparation of the transcript of the record, without designating by *praecipe* what parts thereof to certify, if such transcript so prepared is insufficient, the fault lies with the litigant, not with the clerk. Appellant says that the defect in the record was the result of some *oversight*, but does not say what the oversight was, or whose it was. He does not say that he filed the *praecipe* with the clerk of the district court, or that he made any examination whatever of the transcript which the clerk authenticated and delivered to him. This question involves an important rule of practice. It has been enforced many times in cases similar to this, and in dismissing this appeal we are but following our established practice. As it is not too late for the suing out of a writ of error, an order will be entered permitting appellant to withdraw his transcript heretofore filed and his appeal will be dismissed without prejudice.

Appeal dismissed without prejudice.

Mr. JUSTICE GABBERT and Mr. JUSTICE MUSSER concur.

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[No. 6428.]

BREENE v. BREENE.

1. BILL OF EXCEPTIONS—*When Necessary*—When, in *habeas corpus* proceedings, the record contains no bill of exceptions, the court of review will assume that the evidence sustains the findings of the court below—(344).

2. HABEAS CORPUS—*Jurisdiction*—The writ operates upon the person of the respondent found within the jurisdiction, and he may be compelled to produce a child which is in his custody, though without the jurisdiction—(345).

And the child being brought before the court, the court may dispose of it according to what may appear to be for the interest of the child—(345, 356).

3. CUSTODY OF CHILDREN—*Right of parents*—The rule of the common law which gave to the father a right to the custody of the child superior to that of the mother, has been greatly relaxed. The paternal right is subordinated to the welfare of the child, and this, whether the father is or is not a suitable person to have its custody—(346).

The father and mother, residents of Colorado, were separated. A child of three years had been in the custody of the mother since their separation. The father in the absence of the mother secured possession of it and carried it to New York, where he left it in custody of a distant relative. In view of the fact that this entirely separated the child from both of the parents, and left it to be nurtured during its tenderest years among strangers, that the mother was financially of better ability than was the father, to provide for it, and that the conduct of the father, in the manner of securing the custody of the infant, and disposing of it among strangers, gave occasion to question his solicitude for the welfare of the child, and that the disposition made by the father would entirely remove the child from the maternal affections and care, the court committed it to the mother—(346, 348).

4. ——*Parent's Right of Visitation*—In the same case, no application being made in the court below for permission to the father to visit the child, the court refused to reverse the final order for this omission. The court said that the affirmation of the order would not preclude the court below from making the proper order allowing such visits, or other order, from time to time, touching the custody of the child, as changing conditions might require or justify—(348).

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Error to Denver District Court—HON. CARLTON M. BLISS, Judge.

Messrs. DIXON & DIXON for plaintiff in error.
Mr. A. M. STEVENSON for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This is one of that unfortunate class of cases involving the right to the custody of an infant child as between the father and the mother. The proceeding was in *habeas corpus*. It appears from the record, that the plaintiff in error, Peter W. Breene and Bernice Breene, upon whose relation this action was brought, are husband and wife, both residents of Denver; that they had one child William Breene, born about November 20th, 1904; that after the birth of said child they continued to live together until about November, 1906, at which time they separated; that in 1907 negotiations were opened between their respective attorneys with a view to a settlement of their property rights; that at this time the child was in the exclusive possession of its mother, and had been since their separation; that on or about the 13th of October, 1907, when the child was in charge of its nurse, the father, without the consent of, and in some manner unknown to the mother, secured possession of it, immediately taking it to the City of New York, where he placed it in the custody of one of his distant relatives, intending to have it retained there. The writ of *habeas corpus* was not prayed for or issued until after the child had been removed from Colorado, but was issued immediately thereafter. Upon answer made, the respondent was ordered to have the child returned. The trial judge stated in his findings of fact that he did not regard the father as a person unfit to have the custody of the child, but was of the opinion that the best interest of the child, at its then

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age, required that its custody be placed with the petitioner, its mother, which was so ordered. The cause is brought here by the respondent for review upon error.

The plaintiff in error has not seen fit to bring up the evidence for our consideration, for which reason we must assume that it sustains the findings of the trial court, that the mother was a fit person to have the custody of the child during its tender years, and that it was for the best interest of the child, that its custody be placed with her.

The validity of the judgment is assailed upon five principal grounds. First, that as there was no action pending at the time the child was removed by its father to the state of New York, the court was without jurisdiction upon *habeas corpus* to order the father to return it to Colorado. Second, that under the common law the father was entitled to the custody of the children, and that as the common law has not been abrogated by any statute of this state it is controlling in a case of this kind. Third, that even if General Section 2912 of the Revised Statutes of 1908 could be held applicable, it does not apply to a case where the father and mother are living separate and apart; also in case this section is held applicable that construction of it would make it unconstitutional, for the reason that its title is not broad enough to include this portion of the act which differs materially from the substance of the former act amended. Fourth, that the judgment is contrary to the findings of the court, for the reason, that it having found the husband was not an unsuitable person to be awarded the custody of the child, it should have been so awarded to him. Fifth, that the judgment is erroneous in that it deprives the respondent of the right of visitation, and makes no provision for such visits or communication with the child by him under any regulations or at all.

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Counsel have cited no authorities to support their first contention, but base their argument solely upon the language of our statute; from its language we conclude that it was never intended it should be given such a narrow construction as contended for. The record discloses, that both the petitioner and respondent were residents of the City of Denver and within the jurisdiction of the trial court; that the wrongful act complained of was performed within said city. Numerous cases hold that the writ operates upon the person within the jurisdiction and he can be compelled to produce a child from without the jurisdiction.

In Church on Habeas Corpus, at page 170, it is said:

"The writ of *habeas corpus* is sometimes resorted to as a foundation for reaching persons restrained of their liberty beyond the jurisdiction of the court to which application is made, but which restraint has been caused by a person acting within the jurisdiction of the court; * * * This question comes up most frequently in cases concerning the custody of infant children; and where a person is shown to have once had the custody of a child, and he has parted with it to some one else wrongfully, that is, without legal authority, so that it is true that he cannot redeliver the child at the time when its production is required, the child being then out of his possession, custody, and control, the fact that he has so parted with the possession of the child is no answer to proceedings to compel its production on *habeas corpus*, except where there is clear proof of an absolute impossibility to produce the child."

In the case at bar the writ operated upon the person within the state; the return admitted that the child was in the custody of respondent and within his power to produce within twenty days; respondent did produce the child in obedience to the writ, and thereby

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placed the child in the custody of the court. Under this state of facts, we conclude that the court was within its jurisdiction in the issuance of the writ in the first instance and in the disposition of the child thereafter. This position seems to be supported by all the authorities cited upon the subject.—*The Queen v. Barnardo*, 23 Q. B. D. 305; *The Queen v. Barnardo*, 24 Q. B. D. 283; *In the Matter of Jackson*, 15 Mich. 416; *Rivers v. Mitchell*, 57 Iowa 193.

We find it unnecessary to determine the constitutionality of General Section 2912, Rev. Stat. 1908, for the reason that the great weight of authority in the United States is to the effect that the old rigid rule of the common law contended for by counsel, which gave to the father, by reason of the paternal relation, under all circumstances, except in very extreme cases, a right to the custody and services of his child, superior to that of the mother and of all others, in modern times, has been greatly modified and relaxed both in England and America. It is now almost universally conceded in both countries that this paternal right must yield and be subordinated to the interest and welfare of the child under the control of the state. In this jurisdiction the paramount and controlling question by which the court must be guided is the interest and welfare of the child.—*McKercher et al. v. Green*, 13 Colo. App. 270; *Wilson et al. v. Mitchell*, 48 Colo. 454.

This power exists whether given by the section above referred to or not. The decree herein affecting the custody of the child was made by the trial court in the exercise of a discretionary power, and, as the plaintiff in error has not seen fit to bring up for our consideration the evidence upon which this discretion was based, we are not in a position to review it with a view of saying whether there was an abuse of such discretion. We understand the above is the rule, regardless of the fact that the father, as in this case, is held to be

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not an unsuitable person to be awarded the custody of the child. Many other matters may, and probably did, enter into this question. Neither of the parties has an absolute right that can militate against the welfare of the infant.

From the record before us, we can gather several sound reasons which might have been partially controlling in the mind of the trial court in exercising its discretion. First, the age of the child (under three years); second, that the mother was a competent person to have it; third, that the father, while a competent person to have its custody, by his own pleadings showed that he was not possessed of sufficient means to provide and care for it as its mother was; fourth, the acts of the father in the manner he secured its possession from the mother, and in removing it to the City of New York and there placing it in the hands of strangers to the child, and his returning to Denver. These matters might have caused the court to believe that the father did not appreciate its happiness and welfare in the future, to the extent of the mother, and that, as this was intended to be his disposition of the little one, it would thereby be removed from the affections, love and care of the mother or any one else who was near and dear to it, to be thus reared among strangers without having those feelings of love, affection and tenderness lavished upon it, which are so necessary and vital to a child of infant years, not only for its happiness during that period, but in the molding and making of its character for the years to come. This meant the rearing of the child in the City of New York, when its father and mother were both residents of the City of Denver, and, so far as we are advised, intended to so remain. This would prevent the mother from having reasonable opportunity to visit her little one, and meant that it was to be reared among strangers two thousand miles from both father and mother,

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during that period of life when the prattle of the little tongue sounds sweeter to the ears of the parent than the strains of any music of human composition yet presented. This natural right of association between parent and child was to be denied both mother and father during that period of the child's life when its very presence has a tendency to soften the hearts of the parents to all mankind, and works as a material aid in keeping the parents younger in their environments and more tender in their nature. Yet, according to the father's admitted plans, all this was to be denied both him and the mother without any reasonable reason therefor. These matters and many others may have been controlling in the mind of the trial court in the exercising of its discretion, regardless of the fitness of the father otherwise to be awarded the custody of the child.

The complaint that the judgment is erroneous in that it deprives the respondent of the right of visitation and makes no provision for such visits, is not properly presented by the record, for the reason that the final decree is not embodied in the record and we are not advised what it contains.

In addition, by an examination of the original record, we find that the attorneys for the petitioner requested that the court make provisions, if the respondent so desired, for his visiting the child at reasonable times. The court was in doubt of its right so to do in a *habeas corpus* action, when the court so stated counsel for the respondent replied, "I want that to appear in the record—that the court has refused to permit the father to see the child." To which the court responded, "Did you apply for such an order?" Counsel stated, "I did not ask for it." The court replied, "Then let the record show that Judge Dixon refuses to ask for an order permitting the father to see the child." The court further stated to counsel for re-

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spondent, "if you wish to ask for permission for the respondent to visit this child at any reasonable time, the court will so order now, if you wish to ask the court to do it." To which counsel replied, "It is impossible, if your Honor please, for me to ask it, because Mr. Breene has left. It is now ten o'clock at night and I cannot see him; it is impossible for me to speak for him in the premises." Counsel for the petitioner states in his brief that an order allowing the respondent to visit the child at reasonable times has been made by the trial court since the rendition of the judgment; it is not a part of this record, and we have no official evidence of that fact, but under the record as here disclosed, we do not think that this cause should be reversed for the reason that no such condition is placed in the order providing for a judgment for final decree. The respondent's counsel were advised that they could have it therein if they so desired and cared to make a request that it be so included. We are also of the opinion that these matters do not preclude the respondent from having the right to visit his child at reasonable times, and under such regulations as might be provided for by the court, and that in case such an order has not been made and this right is refused him, the affirmance of this judgment would not preclude the trial court, upon proper application, from entering such an order, as in its discretion the facts would warrant; as likewise, it would not preclude the court in this case or in some other proper case from making further orders pertaining to the custody of a child when conditions may have changed which would warrant and justify the making of any change concerning its custody.

For the reasons stated, the judgment is affirmed.

Affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE MUSSER concur.

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[No. 6434.]

QUINN v. THE PEOPLE.

CRIMINAL LAW—*Sale of Intoxicating Liquors to Minor—View* Where in a prosecution for the sale of liquor to a minor, the evidence as to the age of the alleged minor is in conflict, the jury may take into consideration his size and appearance; but where such appearances are to be considered they should be detailed in testimony which can be preserved in the record—(353).

Doubted if the omission of such testimony, or the preservation thereof in the record, would be error, where the attention of the jury is called to the appearance of the alleged minor, as evidence of his minority—(352).

But where no evidence at all is offered upon the question of age, and the attention of the jury has not been directed to the appearance of the witness, for that purpose, a conviction can not stand—(353).

Error to Denver Juvenile Court—Hon. W. G. ALEXANDER, Judge.

Mr. RICHARD PEETE for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, and Mr. GEORGE D. TALBOT for the people.

Mr. JUSTICE HILL delivered the opinion of the court:

Prosecution for selling intoxicating liquors to a minor; trial by jury; verdict and judgment for the people; the defendant brings the case here for review upon error. At the close of the people's case, as well as upon the motion for a new trial, the sufficiency of the evidence to sustain the conviction was challenged. Lawrence Doughty, the witness who testified to the purchase of the liquor at the defendant's drug store, was not asked and did not testify to the fact that he was a minor. He was not asked any question concerning his age; nor was any other witness asked any question concerning Doughty's age, and neither he nor any

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other witness gave any testimony concerning his size, general appearance, etc., pertaining to his age, or otherwise. In no manner, during the introduction of the testimony, was the jury's attention called to the appearance of the witness in order to take that fact into consideration in passing upon his age. The learned attorney general admits that there was no testimony, oral or documentary on this point; so the question presented is, can the age of the minor be determined by inspection only, when at no time during the introduction of the evidence was the attention of the jury called to the fact that the witness was on inspection for that purpose? Under such a state of the record we do not think that there was any evidence upon which a conviction could be sustained. The gist of the crime charged was not the sale of the liquor; the defendant was licensed to make sales of liquors. In order to make it a crime the sale had to be to a minor, unaccompanied by either of his parents, etc., in which case the age of the purchaser was the controlling issue. While it is true where a witness is ten or twelve years of age, the observation of the jury as to his appearance in connection with other evidence pertaining to his age might be entitled to great weight (even controlling where the evidence is conflicting), yet where the witness is of the age of twenty years and eleven months and of the average size and appearance of a person of that age, the observation of the jury from his appearance would be absolutely worthless, and when standing alone would be no evidence at all upon the subject. The record gives us no intimation, by a description of the witness or otherwise, as to about what his age may have been, or any thing from which we can say that there was any evidence to the effect that the witness was a minor.

In *Stephenson v. The State*, 28 Ind. 272, where the age of the defendant was material, it was held that the

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age of the accused must be proven by sworn testimony and that the court or jury could not determine this fact for themselves from the personal appearance of the accused alone.

The case of *Ihinger v. The State*, 53 Ind. 251, goes further, it holds that the appearance of a witness in respect to his age, as seen by the court or jury cannot be considered as evidence, either with or without competent evidence of his age, in determining whether or not the defendant acted in good faith in selling him the liquor.

This last case appears to be reasoned upon the theory that there is no mode of putting such evidence upon the record in order that it may be passed upon by an appellate tribunal. Also, that on the motion for a new trial the judge would have to substitute his impressions, as to the appearance of the witness as to age, for those of the jury; the court concluded that the jury could not consider the appearance of the witness in respect to his age, as they viewed him, aside from evidence given as to his appearance.

Other cases take a contrary view and hold that where there is a conflict of evidence as to the age of the witness that the jury have the right to consider his size, appearance, etc., to aid them in coming to a conclusion as to his age.—*State v. McNair*, 93 N. C. 628.

Another class of cases, under statutes which sanction evidence obtained by view in criminal cases, holds that where the knowledge of the person charged as to the other party being a minor is material, that the jury might determine from the personal appearance or view only of the party whether the defendant knew or had reasonable grounds to believe that the witness was under the age of twenty-one years when the act complained of was committed.—*Hermann v. The State*, 73 Wis. 248. This line of cases would not be altogether applicable to the case at bar; here the lack of knowl-

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edge of the defendant, or as alleged in this case that of his clerk, as to the age of the witness, is immaterial, and we, at this time, do not deem it necessary to lay down any rule as controlling in all such cases.

Our conclusions are, that in such cases where there is a conflict in the evidence concerning the age of the witness, the jury should have a right to take into consideration his size, appearance, etc., in connection with the other evidence, but that when it is to be so considered the better rule is to have such description, appearance, etc., supplied by evidence, which can be properly preserved in the record, but it probably would not be error, were this omitted, where the jury's attention has been called to the appearance of the witness for that purpose. But where no evidence has been offered upon the subject, and where the attention of the jury has not been called to the appearance of the witness for that purpose, it is prejudicial error to accept the finding of a jury concerning the age of the witness when it is material to a conviction, with no evidence of any kind upon the subject.

As this error necessitates a reversal of the judgment, the others urged will not be considered. The judgment is reversed and the cause remanded for a new trial.

Reversed.

Mr. JUSTICE GABBERT and Mr. JUSTICE MUSSER concur.

[No. 6583.]

THE WOODMEN INVESTMENT ASSOCIATION v. GRAND JUNCTION ET AL.

WRIT OF ERROR—*Discontinuance*—Pending a writ of error, an event occurs which makes a determination of the cause unnecessary, or renders it impossible to grant effectual relief. The writ of error may be dismissed.

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Error to Mesa District Court—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. HENRY R. RHONE for plaintiff in error.

No appearance for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

On February 5th, 1908, by proceedings on *certiorari* the plaintiff in error, as relator, commenced this action in the lower court against the defendants in error, as respondents, to have declared null and void and of no effect, t woliquor licenses issued June 13th, 1907, and September 10th, 1907, to W. A. Lynch and Company for the sale of intoxicating liquors in the City of Grand Junction. The petition discloses that each license was for a period of six months, both of which have long since expired. The principal questions sought to be reviewed are questions of facts which may never arise again in a similar case; in any event no relief could be given to the plaintiff in error were a decision rendered in its favor. The licenses having long since expired, a trial to declare them null and void would accomplish nothing. A writ of error may be dismissed, if, pending a decision, an event occurs which makes a determination of it unnecessary, or renders it impossible for the courts to grant effectual relief.—*Knowles v. Harrington,* 45 Colo. 346; *State Equalization Board v. People,* 30 Colo. 271; *Floyd v. Cochran,* 24 Colo. 489; *Hunter v. Dickinson,* 3 Colo. App. 372; 3 Cyc. 188.

For these reasons this writ of error is dismissed.

Dismissed.

Mr. JUSTICE GABBERT and Mr. JUSTICE MUSSER concur.

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[No. 6628.]

KNOLLIN ET AL. v. THE WESTERN LIVE STOCK COMMISSION COMPANY.

1. INSTRUCTIONS—*Not Based on the Evidence*—Instructions presenting a theory which there is no evidence to sustain are properly refused—(357, 358).

2. EVIDENCE—*Relevancy*—Plaintiffs, doing business in Denver, drew a draft upon another house of the same name, but different membership, in Kansas City, in favor of defendant, and the Kansas City house paid it. Plaintiff sued to recover the amount, claiming that it was a loan to defendant. Defendant resisted the action on the ground that, in drawing the draft, plaintiffs were acting as agents of the drawees. Evidence of the agency, and the ratification of the act was produced. *Held*, that, to sustain their contention it was proper to permit defendants to prove a custom that a representative should draw drafts on his principal—(358).

The evidence examined and *held* to justify a verdict for defendants—(357).

Error to Denver District Court—Hon. HARRY C. RIDDLE, Judge.

Messrs. MCKNIGHT & HENRY for plaintiffs in error.

Messrs. ALLEN & WEBSTER for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

Plaintiffs in error, who were plaintiffs below, instituted this action. The complaint contends two counts. One in debt, and one for money loaned; both are intended to cover the same transaction. The answer was a general denial, including, originally, a cross-complaint and counter-claim setting forth, that the plaintiff Knollin was also interested in a Kansas City commission house, doing business under the same name as the plaintiffs in error; that by reason of negligence of the Kansas City firm, of which one of the plaintiffs

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in error was not a party, a certain lot of sheep shipped them by the defendant was sold for less than their market value, etc. The defendant prayed judgment for damages. The cross-complaint or counter-claim was stricken out, leaving only the issues raised by the general denial. A trial by jury resulted in a verdict and judgment for the defendant; the plaintiffs bring the case here for review upon error.

There is but little conflict in the evidence, and when considered as a whole, we think it sustains the findings of the jury and the views of the trial court. It was established, without contradiction, that the plaintiffs were co-partners doing business at Denver, Colorado, under the firm name and style of The Knollin Sheep Commission Company; that the plaintiff, Knollin, was engaged in the same business at Kansas City with one Leitch, as co-partners under the same name; that the two firms co-operated together, to a certain extent, in a friendly way; that on or about October 16th, 1906, the defendant was shipping a large number of sheep to the Knollin Sheep Commission Company at Kansas City, at which time, through conversations and arrangements between them, the Denver firm made sight draft upon the Kansas City firm, payable and delivered to the order of the defendant, for $7,000, which placed it in its Denver bank, and through the regular course of exchange it was ultimately paid by the Kansas City firm. This draft was made and delivered upon account of this shipment of sheep. It appears when they were sold by the Kansas City house they brought, deducting expenses, about $720 less than the amount of this draft, and this action is brought by the Denver house to recover this amount with interest, without claiming any assignment or transfer by the Kansas City firm to it of this claim, claiming that the original draft for $7,000 was an advance or loan made by it to the defendant.

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The defendant claims, and we think the evidence supports its contention, that in the execution of this draft the plaintiffs in error were acting as the representatives and agents of the Kansas City firm; that such relation existed between them, and that in this transaction it acted as agent for the Kansas City house, between which and the defendant the entire transaction took place. The defendant admits the receipt of the $7,000 paid by the Kansas City firm through the medium of this draft. It, likewise, claims a counter-claim against the Kansas City house, but denies any business relation in connection with this transaction between it and the Denver firm. As there is no contention made of any assignment of this account to the plaintiffs, we think defendant's position is correct. The assignments of error upon the theory that there was no competent evidence in favor of the defendant upon the issues thus formed, are not well taken. There is evidence to the fact that the Kansas City house ratified all the actions of the Denver house in this matter as being done for them, not only by paying the draft, but in their correspondence thereafter wherein, through their sales items, they charged it to the defendant, also by their written instructions to the Denver house to collect the deficit from the defendant and remit it to them. There is also evidence to the effect that after this transaction had taken place the manager of the Denver house, who had made this draft, stated to the manager of the defendant, that it was wholly a matter between the Kansis City house and the defendant, and not him. Under this view of the case, the refusal of the trial court to give the instructions covered by the plaintiffs' third, fourth, fifth, sixth and seventh assignments of error, which were based upon the presumption that there was no evidence in the case to establish agency, was correct.

Their complaint against the instructions of the court in submitting to the jury the question of whether

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or not the Denver house was the agent of the Kansas City house, was not well taken. Counsel base their complaints upon the theory that there is no evidence in the record that the Denver house was in any sense an agent of the Kansas City house in this transaction. We do not agree with this construction, but approve the position of the trial court in this respect.

Complaint is also made to the admission of the testimony of custom and usage of representatives in drawing drafts on eastern houses. We find no error in this respect. There was evidence to show such agency, and, as we understand it, this evidence of custom was introduced for the purpose of showing that it was a common and ordinary thing for agents to draw sight drafts upon their principals, where live stock had been consigned to the principals, and as tending to disprove the contentions of the plaintiffs in error, that the facts, as presented, made of it a loan or advancement to the defendant by the plaintiffs in error, known as the Denver house.

Perceiving no prejudicial error, the judgment is affirmed.

Affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE MUSSER concur.

[No. 6649.]

JOHNSON COUNTY SAVINGS BANK v. GREGG.

1. NEGOTIABLE PAPER—*Endorsee Without Consideration—Defenses*—In an action upon an accepted bill of exchange, by endorsee, an answer showing fraud of the drawer and payee, in procuring the acceptance, and that the endorsee is not a holder in good faith, but a mere agent or representative of the drawer, lending its name to assist in the consummation of the fraud, states a defense—(362).

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2. EVIDENCE—*Burden of Proof*—Under Rev. Stat. sec. 4518, the drawer and payee of an acceptance obtained by his fraud, acquires no title, and under Rev. Stat. sec. 4522, the burden is upon the endorsee to show that he acquired the paper before maturity, in good faith, and for value—(362).

3. ——*Competency*—In an action upon a bill of exchange given for goods sold, the plaintiff being an endorsee, and fraud in procuring the acceptance and that plaintiff is a mere agent and representative of the payee, being pleaded, false representation of the drawer's agent inducing the sale are admissible—(363).

All the details of the transaction may be put in evidence as pertinent to the allegation of fraud—(363).

4. CONTRACT—*Rescission*—Merchant sued upon a bill of exchange given for goods which he was induced to purchase, by false representations, offers to allow judgment for the return of the goods remaining unsold, and for the amount obtained by the sale of such part of the goods as has been sold. *Held*, a sufficient recission—(363).

Error to Boulder District Court—HON. JAMES E. GARRIGUES, Judge.

Mr. CHARLES M. CAMPBELL for plaintiff in error.

Mr. RICHARD H. WHITELEY for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

On June 15th, 1904, at Ward, Colorado, the defendant in error made and delivered to The Puritan Manufacturing Company (an Iowa corporation) his written acceptance of a certain order, a copy of which is as follows:

"Customer's Acceptance. Accepted. Chas. G. Gregg.
Customer's Signature.
Puritan Mfg. Company. No. 3841.
Iowa City, Ia., June 15, 1904.

Thirteen months after date .... pay to Puritan Mfg. Company or order three hundred and eighty dollars, $380.00. Value received and charge to ac-

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count of Puritan Mfg. Company. Per CLV.
To Chas. G. Gregg, Ward, Colo."

About September the 6th, 1904, it appears this order was, by The Puritan Manufacturing Company, endorsed and delivered to the plaintiff in error; upon its non-payment this action was brought to recover the amount. The answer of the defendant denied that the plaintiff was the owner of the instrument, or that it had been transferred and delivered to the plaintiff in the ordinary course of business or for a valuable consideration. It further alleged fraud in the securance of the acceptance upon behalf of The Puritan Manufacturing Company and sets forth, that the plaintiff was, in reality, a collecting agency for the manufacturing company; that it was advised of all facts pertaining to said matter prior to the alleged transfer; that the consideration for said acceptance was certain merchandise received under the warranty of The Puritan Manufacturing Company with a guaranty for a period of five years, with the further agreement that the paper of the defendant should not be negotiated, but would be held, so that it could be returned or cancelled, as per certain agreements between the parties, and many other defenses not necessary to mention, with the further statement that the defendant had made sales of $20.05 of the goods so purchased and he offered that judgment might be taken against him for this amount and for the return of the balance of the merchandise remaining unsold. Trial was to the court, which found, that the defendant executed the acceptance in question; that The Puritan Manufacturing Company of Iowa City, Iowa, is a fraudulent institution engaged in illegitimate business; that its promoters or proprietors are engaged in fraudulent transactions as a business; that they intentionally deceive the public with their goods; that the name Puritan is a misnomer; that their agent, who sold the goods to

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the defendant for which the acceptance was executed, came here for the purpose of deceiving and defrauding him; that the company sent him out for that purpose; that the goods were worthless, of no account whatever; that the whole transaction was based upon an intentional wrong; that it was not only a fraudulent transaction, but the consideration had failed upon which the instrument was based; that the Johnson County Savings Bank, plaintiff in error, was not the holder of said note in due course of business; that the transaction was more in the nature of using the bank as a collecting agency for the purpose of aiding The Puritan Manufacturing Company in the collection of its paper; that The Puritan Manufacturing Company intended to deceive the defendant by selling him false goods, or worthless goods, and taking his note payable at a future time and to evade the law by appearing to place the note in the hands of an innocent purchaser, so the defendant could not set up a defense; that the bank, the plaintiff in error, was willing to lend its assistance to the company; that it did not in fact buy the notes, but took them colorably as a purchaser, but legally in the nature of a collection; that the bank was not a holder in due course of trade. The judgment was against the defendant in the sum of $20.05 and for the return to the plaintiff of the goods unsold; the plaintiff prosecutes this writ of error.

The plaintiff in error has assigned twenty-seven alleged errors for our consideration. These may be grouped into three divisions. The first considered pertains to the sufficiency of the evidence to sustain the findings and the judgment. Without going into the history and making an analysis of the evidence, we think it sufficient to sustain the findings of the trial court. In this respect, we find that the supreme court of the state of Iowa (the resident state of the plaintiff) and that of other states where this same company

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has been making similar contentions, all appear to take the same view as the trial court did in this case.—*Puritan Mfg. Co. v. Emporium,* 130 Iowa 526; *Puritan Mfg. Co. v. Renaker,* 106 S. W. (Ky.) 813; *Puritan Mfg. Co. v. Westermire,* 47 Oregon 557; *Puritan Mfg. Co. v. Bouteiller et al.,* 79 Conn. 255.

The second group of assignments pertains to the pleadings in which it is claimed the court erred in denying plaintiff's motion to strike the defendant's answer and in overruling its demurrer thereto. We find no merit in these contentions. The answer alleges facts of fraud in securing the order in the first instance. It further alleges the assignee's knowledge of these facts. It also denies that the plaintiff was an innocent purchaser for value in due course of trade before maturity or at all, and sets forth, in substance, that it was a party to this fraud. We think the answer states a good defense.

The third contention pertains to the admission of evidence and the burden of proof. This can be divided into two sub-divisions. The first refers to who has the burden of proof in showing that the plaintiff became the purchaser for value without notice.

In the case at bar we think the evidence sufficient to establish that the acceptance to the order was obtained through fraud and by false representations, hence void in the hands of the Puritan Manufacturing Company; under Section 4518, Rev. St. 1908, its title was therefore defective. Under Section 4522, Rev. St. 1908, the burden of proof was then upon the plaintiff to show that it was a bona fide holder and that it took the paper before maturity, in good faith and for value. —*Stouffer v. Fletcher,* 146 Mich. 341; *Stouffer v. Clark,* 146 Mich. 345; *Horrigan v. Wyman,* 90 Mich. 121; *Cox v. Cline et al.,* 117 N. W. (Iowa) 48.

Besides, the preponderance of the evidence, if anything, was to the effect that the plaintiff was not in

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fact the owner of this instrument, but that it was still owned by The Puritan Manufacturing Company.

We find no error in the admission of the evidence relating to the representations of the traveling salesman of The Puritan Manufacturing Company. Under the allegations of the defendant's answer, this was a necessary part of his case.—*Johnson County Savings Bank v. Rapp.*, 47 Wash. 30.

Neither do we find the evidence, pertaining to the character of the goods alleged to have been sold, objectionable; nor was the evidence of the details pertaining to the transaction between the defendant and The Puritan Manufacturing Company objectionable. This was all pertinent when applied to the question of the fraud which the defendant alleged had been perpetrated. Some slight evidence may have been admitted, which, technically speaking, was incompetent, but we find none which, in our opinion, worked any prejudice against the rights of the plaintiff in error.

Where the buyer, as in this case, was defrauded in the sale, his offer to allow judgment to be taken against him for the amount of the goods sold and for the return of those unsold (having made a tender of the same) operates as a sufficient rescission of the contract, when it was obtained through fraud. We find no error in this respect.—*Lyon v. Lindblad*, 145 Mich. 588; *Lyon v. Ives*, 148 Mich. 352; *Cox v. Cline et al.*, 117 N. W. (Iowa) 48.

Perceiving no prejudicial error, the judgment will be affirmed.

Affirmed.

MR. JUSTICE GABBERT and MR. JUSTICE MUSSER concur.

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[No. 6664.]

HENDERSON v. COUNTY OF BOULDER.

1. PUBLIC OFFICERS—*Definition*—Every person elected to discharge a public duty, who receives compensation for the same, is a public officer. The county judge is within this category—(366).

2. CONSTITUTIONAL LAW—*Public Officers—Increase of Salary*—Plaintiff was elected to the office of county judge of a county which was then in a class in which the salary of that office was declared to be a sum named, and "no more."

During his term of office the county was transferred to another class in which the county judge was, by statute, entitled to an allowance for clerk hire. *Held*, that under the constitution, Sec. 30 Art. V, the plaintiff was not entitled to this allowance—(367).

Error to Boulder District Court—Hon. HARRY P. GAMBLE, Judge.

Mr. JUNIUS HENDERSON, plaintiff in error, *pro se*.

Mr. F. S. LUETHI, county attorney, for defendant in error.

Hon. Junius Henderson was elected county judge of Boulder county for the term of four years beginning in January, 1905. At the time of his election Boulder county was, for the purpose of fixing salaries of county officers, a third class county—§ 1936h, Mills' Stats., Rev. Supp.—and the compensation and salary of county judges was regulated and fixed by the following section of the statutes:

"The county judges of the several counties of this state shall receive, as their *only* compensation for their services, an annual salary to be paid quarterly out of the fees and emoluments of their respective offices, and out of the fees of the office of clerk of the county court actually collected and not otherwise, including the amount to be paid by the county, to-wit: * * *

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In counties of the second class the sum of three thousand dollars ($3,000.) and twelve hundred dollars ($1200.) for clerk hire. In counties of the third class the sum of three thousand dollars ($3,000.)"

The section then provides that in counties of the first class the county judge shall be allowed a further designated sum per annum for his chief clerk, and then provides:

"In counties of all other classes the compensation of the clerk of the county court shall be a charge upon the county judge, and shall be paid out of the salary herein allowed him, and not otherwise." § 1936p, Mills' Stats., Rev. Supp.

The statute also provided what fees should be charged and collected by the judge of the county court and the clerk of that tribunal for the various official acts which they were required to perform—§§ 1897-1901, *ibid;* and further provided:

"All fees collected by county officers shall be paid over to the county treasurer and shall be kept by him in separate funds to be known as "The County Judges and Clerk of the County Court Fee Fund" * * * and all salaries or compensation of county judges, clerks of county courts * * * and their deputy or assistant clerks * * * shall be paid out of such funds, and no others." § 1936c-1, *ibid.*

In 1907 the General Assembly passed the following act:

"That for the purpose of fixing the compensation of the county commissioners and other officers therein, the county of Boulder shall belong to and be known as a county of the second class." Laws 1907, p. 315; § 2566 Rev. Stats.

After this act took effect, Judge Henderson filed with the board of county commissioners of Boulder county a claim for expenses incurred in the sum of $578.63 for clerk hire between July 8th and December

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31st, 1907, basing his right to be reimbursed for expenses so incurred upon the ground that by virtue of § 1936p, *supra*, and the act of 1907 he was entitled to that sum as compensation, at the rate of $1200 per annum for clerk hire after Boulder county became a county of the second class. The earnings of the office of the clerk of the county court of Boulder county for 1907 was in excess of the salary and claim for clerk hire. The claim was disallowed and claimant appealed to the district court. The district court held that the county was not liable for the claim, and rendered a judgment of dismissal. Plaintiff brings the case here for review on error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The constitution of the state provides as follows:

"Except as otherwise provided in this constitution, no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment." Art. V, § 30.

In support of the contention that the judgment of the district court was erroneous, it is urged that the constitutional provision above quoted does not apply to county officers; that it does not affect officers whose salaries are payable out of the fees of the office; that it does not prohibit the allowance of clerk hire where none had been formerly allowed; and that the constitutional provision referred to is not violated by a change of classification so as to allow clerk hire. Every one elected to discharge a public duty who receives a compensation for the same is a public officer. The duties which a county judge is required to perform are certainly public in their nature, and he is, therefore, a public officer within the meaning of the constitution. His salary or compensation per annum is fixed by statute. True, it is payable only out of the fees of the

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office allowed the judge and clerk of the county court, but it is, nevertheless, a salary, for he must account to the county for such fees. The question, then, to determine, is, does the constitutional provision inhibiting an increase in the salary of a public officer after his election prevent plaintiff in error from receiving the compensation for clerk hire allowed a county judge in counties of the second class?

We think it is clear that it does. When Judge Henderson was elected the statute fixing his compensation specially provided that his salary should be the sum of $3,000, and no more, out of which he was to pay his own clerk hire. In order that this might be clear and not open to question, the act fixing the salary of county judges in counties of the third class provided explicitly that the compensation of the clerk of the county court in counties of that class should be a charge upon the county judge, and paid out of his salary, and not otherwise. The act of 1907, by making Boulder county a county of the second class, allows the county judge of that county an additional compensation for clerk hire in the sum of $1200. That this increases the salary or compensation of the county judge of Boulder county appears to be too plain to admit of argument. The constitution inhibits such increase for any part of the term for which plaintiff in error was elected, consequently he is not entitled to any allowance for clerk hire.

The judgment of the district court is affirmed.

Judgment affirmed.

Decision *en banc.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE BAILEY not participating.

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[No. 6732.]

FERRIS ET AL. V. CHAMBERS ET AL.

1. CHATTEL MORTGAGE—*Extension*—The period prescribed by the phrase "within thirty days after the maturity of the last installment of the indebtedness" in Sec. 520 Rev. Stat., begins with the day succeeding the day of maturity. An extension granted on the day of maturity is premature. A purchaser of the mortgaged chattels from the mortgagor, after the lapse of thirty days from the maturity of the mortgage indebtedness, takes free of the lien of the mortgage, notwithstanding such attempted extension—(370, 371).

2. STATUTES—*Construction*—Every statute must be read as a whole, and its meaning gathered from all its parts—(370).

An attempt to extend, pursuant to the statute, the right given by statute in mortgaged chattels remaining in possession of the mortgagor, must strictly pursue the statute—(372).

3. WORDS AND PHRASES—"After the maturity of the last installment" of a debt, prescribes a period beginning with the day following that on which the debt matures—(370).

Error to Denver District Court—Hon. HUBERT L. SHATTUCK, Judge.

Mr. WALTER E. WHITE and Mr. OMAR E. GARWOOD for plaintiffs in error.

Mr. CLAY B. WHITFORD and Mr. HENRY E. MAY for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

The question presented by this review is, whether or not, under Section 520 Revised Statutes, the filing of a sworn statement on the date of the maturity of the indebtedness, secured by a chattel mortgage, will operate as an extension of the lien, as against a purchaser who buys the mortgaged property more than thirty days after the maturity of the indebtedness. The part of the section which requires notice is as follows:

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"The lien of any chattel mortgage given to secure the payment of any indebtedness, which has been duly admitted to record as provided by law, may, at any time within thirty days after the maturity of the last installment of the indebtedness secured thereby, be extended for the unpaid portion of such indebtedness, by the mortgagee or his assignee filing with the county clerk of the county wherein the mortgage is recorded or filed, a sworn statement showing:

First—The total payments that have been made on the debt, and the amount of the debt which remains unpaid.

Second—That it is still due the mortgagee or his assignee, and that the said mortgagee or his assignee consents to extend the said mortgage for some period not exceeding two years. And, thereupon, the lien of the mortgage shall be extended for such designated period."

The plaintiffs in error contend that the expression "at any time within thirty days after the maturity of the last installment of the indebtedness secured thereby" marks a limit beyond which the statement cannot be filed so as to be operative, and does not fix the first point of time at which the statement may be filed, and cite in support of this position; *French v. Powell,* 135 Cal. 636; *Atherton v. Corliss,* 101 Mass. 40; *Levert v. Read,* 54 Ala. 529; *Young v. The Orpheus,* 119 Mass. 179; *Davis v. Miller,* 130 U. S. 284; *Orcutt v. Moore,* 134 Mass. 48. Others might be cited to the same effect. On the other hand, the defendants in error contend that the statement must be filed within thirty days next after the maturity of the indebtedness, and cite authorities which are based upon statutes that require things to be done within thirty days "next preceding" a certain event. Obviously, these latter authorities are not in point here, for there is a difference between the expression "within thirty days after" a certain event and the

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expression "within thirty days next preceding" a certain event. If there was nothing in our statutes but the expression "at any time within thirty days after the maturity," etc., to indicate when the statement might be filed, there would be no escape from the contention of the plaintiffs in error, and the logic of the authorities cited by them. The section of the statute, however, must be read as a whole, and its intent gathered from all its provisions. The expression "within thirty days after the maturity" may mean before or not beyond thirty days after maturity, if the statute does not contain any provision that is inconsistent with such meaning, or it may mean within the thirty days after maturity if there are other things in the statute that indicate that that was the legislative intent.

The statement that may be filed must show the total payments that have been made on the debt and the amount of the debt which remains unpaid. Payments are usually made at maturity and not before, and when payments are spoken of, the mind recurs to the time when they ought to have been made, if it recurs to time at all. The requiring of a statement that a debt is unpaid seems naturally to refer to a time after it ought to have been paid; that is, after maturity, for before maturity one does not think of a debt other than as being unpaid. So that the legislature must have had in mind the time after a payment ought to have been made. The requirement that the statement shall show that the unpaid portion of the indebtedness is still due the mortgagee or his assignee, seems also to refer to a time subsequent to the maturity of the debt, using "due" in the sense that the debt was justly subsisting or outstanding. The words "still due" refer to a time subsequent to a time when the debt was known or taken to be due. Before maturity a debt is taken to be due to the mortgagee or his assignee, and it is only after

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maturity that the question whether it is "still due" will arise.

Again, the object of the statement is to apprise the public of the condition of the indebtedness. Up to the time of maturity they are presumed to know that the debt is unpaid and outstanding. From the face of the recorded mortgage it is to be presumed that a change will take place at maturity, and that that change will be the extinguishment of the debt. If it is not extinguished at maturity the public can not presume that it is outstanding thereafter. The object of the statement is to make known the condition after the time it ought to have been paid, for before that time the mortgage itself makes the condition known. The statute gives the mortgagee or his assignee the right to file the statement and extend the lien. What necessity is there for the mortgagee to extend the lien before his first one has ripened when section 518 Rev. Stat., which was in effect when section 520 was passed, preserves the lien for thirty days after maturity without taking possession? The fact that the debt will not be paid at maturity, thus showing the probable necessity for an extension or taking possession, cannot be known until after maturity. The inevitable conclusion from all the foregoing considerations is that the legislature had in mind the thirty days after maturity for the filing of the statement. This being so, the statement in this case was prematurely filed, for the period after maturity did not commence until the beginning of the next day.

In *Biteler v. Baldwin*, 42 O. St. 125, under a statute that provided that in order to preserve the lien of a chattel mortgage beyond the first year, a statement and copy should be filed within thirty days next preceding the expiration of the year, the filing of a copy and statement, before the commencement of the thirty days, was held insufficient. In *Rice v. Kahn*, 70 Wis.

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327, under a statute providing that an affidavit in renewal of a mortgage should be filed within thirty days next preceding the expiration of two years, it was held that an affidavit filed more than thirty days before the expiration of two years was insufficient. In Jones on Chattel Mortgages, (5th ed.) § 287, and also in Boone on Mortgages, § 250, it is said that a refiling of the mortgage is nugatory if done either before or after the time limited for that purpose. Provisions of a statute, rendering a chattel mortgage effective, even though the mortgagor retains possession of the property, are statutory, and if the statute prescribes that, in order to preserve the lien of a mortgage with the property in possession of the mortgagor, something shall be done, that thing must be done as prescribed by the statute. *Burchinell v. Gorsline*, 11 Colo. App. 22.

As it has been found that the sworn statement necessary to preserve the lien must be filed within the thirty days next after maturity, the statute in this case was not followed, and as a consequence the lien of the mortgage was not preserved as against a subsequent purchaser, who purchased after the expiration of the thirty days allowed by section 518 within which to take possession. It is not necessary to say what the rights of the purchaser would have been had the purchase been made within the thirty days and no possession taken, for that fact is not in this case.

Inasmuch as the District Court reached the same conclusion, its judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE HILL and Mr. JUSTICE GARRIGUES concur.

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[No. 6692.]

ADCOCK v. LIEBER.

1. STATUTE OF FRAUDS—*Part Performance*—Plaintiff solicited defendant to quit his ranch, move to town, take possession of, furnish, and conduct a hotel on certain premises, promising that if he would do so, he, plaintiff, would execute to him a lease of the hotel at a specified rent for a specified term of years. Defendant complied with this request, removed from his ranch, assumed possession of and furnished the hotel, and paid rentals monthly for several months. *Held*, a sufficient part performance to entitle defendant to specific performance of the cntract lease—(375).

2. WRONGFUL DETAINER—*Equitable Defenses*—Under the statute, (Rev. Stat. sec. 2612, 2603, cl. 6,) equitable defenses may be interposed in the action of wrongful detainer—(375, 376).

3. SPECIFIC PERFORMANCE, of a verbal agreement to execute a lease of lands can not be had in an action for the wrongful detainer of the lands—(375).

Error to Lincoln County Court—Hon. CLARENCE M. MILES, Judge.

Mr. A. E. BOWE for plaintiff in error.

Mr. CHARLES L. DICKERSON and Mr. W. H. ABBOTT for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

Lieber, the plaintiff below, began an action of unlawful detainer before a justice of the peace, to recover possession of premises upon which was the Hugo Hotel and a frame dwelling-house. In substance, the complaint alleged that the plaintiff was the owner of the premises; that he had verbally leased the same to the defendant, Adcock, from month to month for $35.00 a month, payable in advance; that the defendant went into possession on July 2, 1907; that the plaintiff had terminated the tenancy by a proper notice and demanded possession, which was refused. The defend-

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ant, in his answer, after certain denials and admissions, alleged that, about the month of February, 1907, the defendant and his family were residing upon and conducting a ranch near Hugo, and about that time plaintiff came to the defendant and told the latter that the plaintiff desired to have a hotel conducted on the premises, and that if the defendant would leave the ranch, move to Hugo and furnish the hotel, the plaintiff would build one on the premises, and would lease the premises to the defendant by a proper and sufficient lease for three years from the time the hotel building was completed at $35.00 per month; that the defendant accepted the offer and moved to Hugo; that the plaintiff built the hotel building, and the defendant, at a cost of about $500.00, furnished the hotel and took possession thereof on the 2d day of July under the agreement, and from that time paid the plaintiff $35.00 a month as rent, but the plaintiff, although requested so to do, had failed and refused to make and execute a lease of the premises.

At the trial, on appeal to the county court, the defendant offered to prove the allegations of his answer, but was not allowed to do so. The court took the position that because the alleged contract for a three years' lease was not in writing it was void under the statute of frauds. The court directed a verdict for plaintiff, and upon this verdict judgment was entered against the defendant.

Section 2662 of Chapter 54 Revised Statutes provides that any contract for the leasing of any lands for a longer period than one year shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease is to be made. Section 2664 provides that nothing in the chapter shall be construed to abridge the powers of courts of equity to compel a specific performance of agreements in case

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of part performance. The contract alleged by the defendant was void under Section 2662 because not in writing, unless there was such part performance as would take it out of the statute. What was done under this alleged contract which the defendant was not permitted to prove because not in writing? The plaintiff erected the hotel building and gave the possession of it to the defendant; the latter left his ranch, moved to the premises, furnished the hotel and paid the rent for at least four months to the time that the action for unlawful detainer was begun. Plaintiff had done all he had contracted to do except to execute the lease. Defendant, at great expense and the sacrifice of his ranch business, had done all he had agreed to do, except to continue the payment of the monthly rental as it fell due. Beyond question, this was a sufficient part performance to take the contract out of the operation of the statute, so that the defendant could compel the plaintiff to execute a lease for three years in a court of equity. *Wallace v. Scoggins*, 17 Am. St. Rep. 749, and note beginning at bottom of page 755 and on page 766. If this is not so, then the statute can be used by a lessor to work a fraud and a wrong upon a lessee. It is true that specific performance of such a contract cannot be compelled in a suit for unlawful detainer. Can such a contract and the facts which take it out of the operation of the statute of frauds be shown as a defense in such an action? No matter what the law of other jurisdictions may be under their peculiar statutes, this case must be governed by the statutes of this state.

Section 2612, Rev. Stat. provides that the answer of the defendant in an action for unlawful detainer "shall set forth all the substantial facts upon which he relies, entitling him to the possession of the property described in plaintiff's complaint." All the substantial facts upon which he relies, entitling him to the pos-

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session of the property, includes such facts as will entitle him to the possession at law or in equity. The language is broad and comprehensive and does not preclude a defendant from setting up an equitable defense, but rather invites him to do so. In *Hamill v. Bank*, 22 Colo. 384, this Court held specifically that in an action for unlawful detainer, under subdivision 6 of Sec. 2603 Rev. Stat., an equitable defense might be interposed. This is equally true in an action under subdivision 3 of that section, under which this action was brought. The defendant had a right to give evidence of facts which the statute permitted him to set forth in his answer. Under the facts set forth in the answer, the defendant was not attempting to hold possession by virtue of a void contract, but by virtue of a contract that was valid and enforcible on account of the part performance thereof and under which his possession was obtained. If he could have established the facts alleged in his answer by sufficient evidence, he was entitled to defeat the plaintiff's action. As is shown in *Hamill v. Bank, supra,* the issue was the right to possession. If the plaintiff was in possession by virtue of an enforcible contract with the plaintiff, there is no good reason why he should not have remained in possession. If plaintiff was bound to do that which would give the defendant the right to remain in possession, the plaintiff ought not to be permitted to recover a possession by the violation of that which he was bound to do.

The court below ought to have permitted the defendant to give testimony, if he had any, of the contract and part performance alleged in his answer, and these matters would then have been questions of fact to be determined upon all the evidence in the case. This conclusion having been reached, the judgment should be, and is, reversed.

Judgment reversed.

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Mr. JUSTICE HILL and Mr. JUSTICE GARRIGUES concur.

[No. 6736.]

WIGGINGTON v. DENVER & RIO GRANDE RAILROAD CO.

1. PLEADINGS—*Amendment*—The court should be liberal in allowing amendments, in the interest of justice; but the matter lies in the discretion of the trial court, and its action will not be review unless an abuse of the discretion appears—(379).

2. ——*Cause Shown*—Where plaintiff at the conclusion of the trial below applies for leave to amend his complaint so as to abandon material allegations, but shows no cause for the application, and the application is denied, no court of review can determine that there was an abuse of discretion—(380).

3. ——*Practice—Motion to Strike Out Amendment*—Where an amended complaint is filed, without opportunity to defendant to examine it in advance, and state his objections to it, a motion to strike is proper—(380, 381).

Error to Mesa District Court—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. HENRY R. RHONE for plaintiff in error.

Mr. E. N. CLARK and Mr. J. G. MCMURRY for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

This writ of error is prosecuted to review a judgment dismissing plaintiff's action and taxing him with costs. This result befell the plaintiff in this wise: He filed a complaint in which he said that the railroad company maintained a depot at Grand Junction, and employed one Mahaney as a special policeman in and around its depot and grounds, to call the arrival and departure of trains, to maintain order and to arrest and prosecute all persons violating any of the ordi-

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nances of the city or laws of the state; that while so employed and acting as such special policeman at the depot of the defendant, by its authority and direction, and under color and by virtue of his employment as a special policeman, Mahaney, without a warrant or probable cause, arrested the plaintiff and imprisoned him, causing him to suffer certain indignities and discomforts. The company answered, admitting that it employed Mahaney as a special policeman for the purposes alleged, and that Mahaney, while so employed and while acting as such special policeman, and under color and by virtue of his duties as such, arrested the plaintiff, took him to the city jail and turned him over to the jailer, and the answer then proceeded with many allegations and separate defenses not necessary to mention. At the trial, the defendant made a motion for a directed verdict in its behalf. Thereupon, the plaintiff asked leave to amend his complaint. This was denied. The court overruled the motion for a directed verdict. Thereupon, the plaintiff asked leave to withdraw a juror and file an amended complaint, which motion was granted and the plaintiff was allowed to file an amended complaint within thirty days. In the amended complaint, he omitted all reference to Mahaney as a special policeman, and alleged that the man was employed by the defendant, and that while so employed, by authority and direction of the defendant and under color of his employment, without a warrant or reasonable cause, arrested the plaintiff and imprisoned him. The defendant moved to strike the amended complaint from the files, and this motion was sustained on the 22d of August. The plaintiff took no further steps in the matter, and on October 7th the action was dismissed and judgment rendered against the plaintiff for costs. The plaintiff contends that two errors were committed; the first in refusing his application to amend his complaint during the progress of the trial, and the second

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in sustaining the motion of defendant to strike the amended complaint from the files.

The court and each of the counsel seem to have concluded that if Mahaney was a policeman, and made the arrest by virtue of such authority, the defendant was not liable. While no opinion is expressed as to the correctness of this unanimous conclusion, the happy concord between court and counsel will not be disturbed, for the conclusion is not assigned as error, but, on the contrary, the amendments, which plaintiff desired, were based on its correctness, and the errors go to the action of the court in refusing and striking these amendments.

While courts should be liberal in the allowance of proper amendments in the interest of justice, yet, as said in *Patrick v. Crowe,* 15 Colo. 543, the allowance of such amendments is a matter within the sound discretion of the trial court, the exercise of which will only be controlled in case of abuse.

The plaintiff admits in his brief that the record is defective and incomplete in showing just how he proposed to amend his complaint during the trial. After the motion for a directed verdict was made, the plaintiff offered to prove that Mahaney was not a policeman and asked leave to amend his complaint without specifying how he wanted to amend it. From the record, it may be gathered that he desired to amend so as to permit him to show that Mahaney was not a policeman; that is, to show the opposite of that which was alleged in the complaint. Section 81 Rev. Code provides that the court may "upon affidavit showing good cause therefor" allow an amendment to any pleading. Section 84 provides, that if upon the trial the evidence shall vary from the allegation of a pleading, and the party is surprised thereby, he shall be allowed on motion and "showing cause therefor" to amend his pleading to conform to proofs. It will be noticed that

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these sections each state that the amendments may be allowed upon showing cause therefor. A court, therefore, is not called upon to exercise its discretion in permitting amendments, unless a good cause is shown therefore. We are not talking about a case in which the amendment was allowed, but about one in which an amendment was denied. This distinction should be borne in mind. If no cause was shown for an amendment which was denied, an appellate court cannot say that the trial court did not wisely exercise its discretion in refusing to permit it. Unless a showing of a sufficient cause is made, or a sufficient cause is apparent, an appellate court has no means afforded it by which to determine the question, and if it would say that the lower court committed reversible error, under such circumstances, it would be altogether arbitrary and without reason. Now, in the complaint under consideration, the plaintiff alleged that Mahaney was a policeman and made the arrest by virtue of his authority as such, and maintained that position until after the motion for a directed verdict. Nothing had transpired so far as the record shows to warrant such a change, the testimony did not reveal that Mahaney was not a policeman, the plaintiff did not attempt to show that he had made a mistake, or that he was surprised or misled. In fact, he showed no reason whatever for making this change of front. He merely asked to be allowed to change, giving no reason or cause therefor, whatever. How is this court to determine that the lower court abused its discretion? The same is true with reference to the amended complaint which was filed. The order of the court was, that a juror be allowed to be withdrawn, and that the plaintiff be given thirty days to file an amended complaint. When the amended complaint was filed, without an opportunity for the opposing party to examine it and state in advance his objections to it, it was proper practice

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for the defendant to move to strike. *Anthony v. Slayden,* 27 Colo. 144. It was upon the hearing of this motion that the court exercised its discretion so as to deny the amendment. Here again no showing was made by the plaintiff, so far as appears in this record, for his change in front and in allegation of facts. This court is given no reason or basis upon which to predicate the assertion that the lower court abused its discretion in striking the amended complaint. The plaintiff admits that the record is defective and incomplete in showing just how he desired to amend his complaint. Enough appears, however, to show that the court must have understood that he wanted to amend so as to get away from the allegations of his complaint that Mahaney was a policeman and made the arrest as such. As has been seen, he made no showing of cause for such a change. The court said that he could not amend that way. It is to be gathered from the record that the plaintiff sought to do, by the amended complaint, what the court said he could not do. It may well be argued from the record that the order of court permitting an amended complaint to be filed was limited by the ruling of the court that it could not be amended as proposed, and that in striking the complaint from the files the court did not regard it as complying with its former ruling and order.

As no showing was made of any reason or cause why the mind of the court should change, or the plaintiff be permitted to show the opposite of that which he had alleged in the original complaint, this court cannot say that the lower court abused its discretion in the matter. The judgment is, therefore, affirmed.

Judgment affirmed.

Mr. JUSTICE HILL and Mr. JUSTICE GARRIGUES concur.

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[No. 6450.]

WHITTLE v. DENVER & RIO GRANDE RAILROAD COMPANY.

DEATH—*Actions for Negligence Resulting in—Statute Construed*—The station agent of a railroad company charged with the duty to communicate to the conductor and engineer of the several trains the orders of the train dispatcher as to where they are to pass other trains, is managing the trains, within the meaning of Mills Stat. Sec. 1508 (Rev. Stat. Sec. 2056). If by his negligent failure to deliver an order, a collision occurs, and the death of a passenger results, the railway company is liable.

Error to Denver District Court—HON. HUBERT L. SHATTUCK, Judge.

Mr. WM J. MILES for plaintiffs in error.

Mr. E. N. CLARK for defendant in error.

Section 1508, Mills' Statutes, is as follows:

"Whenever any person shall die from any injury resulting from or occasioned by the negligence * * * of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive, car or train of cars * * * the corporation * * * in whose employ any such officer, agent, servant, (or) employe * * * shall be at the time such injury is committed, * * * shall forfeit and pay for every person and passenger so injured the sum of not exceeding five thousand (5,000) dollars and not less than three thousand (3,000) dollars, which may be sued for and recovered,

First: By the husband or wife of deceased; or

Second: If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of deceased; or

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Third: If such deceased be a minor or unmarried, then by the father or mother who may join in the suit. * * *."

One Archibald Whittle, while a passenger on a train operated by defendant, was killed by a collision between the train upon which he was riding, and a train also operated by the defendant company. The collision occurred in the night time. Plaintiffs in error, the parents of deceased, brought suit against the defendant company to recover the penalty provided in the statute above quoted. In their complaint they alleged, so far as necessary to notice, in order to present the question we are required to determine, that the trains on the line of defendant's road over which the trains in question were being operated were run, stopped and started by the employes in the immediate charge thereof, and passed each other at designated points, as directed by its train dispatcher stationed at the city of Pueblo, by means of telegraphic directions sent by him to its agents at the various stations along its road, it being the duty of the agent receiving such directions to deliver the same to the conductor and engineer of the approaching train for whose guidance it was intended; that it was the duty of the agent receiving directions to be delivered to the conductor and engineer of an approaching train at night time to display a colored light known to defendant's conductors and engineers as the "stop signal," and in case no message or directions were to be delivered to the employes in charge of such train, to display a white light which such employes knew meant for them to proceed, without stopping at the station where such "proceed signal" was displayed; that the agent of defendant in charge of its station at Swallows, received from the train dispatcher at Pueblo a telegram, directing that the train upon which plaintiffs' son was a passenger should meet and pass another train ap-

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proaching from the opposite direction at Beaver, instead of Adobe, as the employes on the train for which such instructions were intended had theretofore been instructed, and that such agent not only failed to signal this train to stop, or deliver to the conductor or engineer the telegraphic direction informing them where they should meet and pass the train approaching from the opposite direction, but left displayed at the station of Swallows the "proceed" signal, which negligence caused the train to pass that station and shortly thereafter to collide with the train which it would have met and passed at Beaver, had the agent at Swallows not been guilty of negligence in the particulars alleged.

To this complaint a general demurrer was interposed, and sustained. Plaintiffs elected to abide by their complaint, whereupon judgment was entered in favor of the defendant, and the action dismissed. Plaintiffs have brought the case here for review on error.

Mr. JUSTICE GABBERT delivered the opinion of the court.

The only question presented for determination is, whether or not the defendant is responsible under the statute for the negligence of its agent at Swallows. According to the averments of the complaint, defendant's trains were run and conducted from point to point along its road by the employes in immediate charge thereof, under the directions of its train dispatcher, communicated to such employes by its station agents, to whom such directions were sent, by means of signals displayed, and delivering to the conductors and engineers of its trains the directions intended to advise them, among other things, where the trains they were operating should meet and pass other trains. Had it been the purpose of the statute to limit its provisions to the employes in the immediate charge of a train, it would have so declared, instead of using

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the expression "any officer, agent, servant or employe whilst running, conducting or managing any * * * train of cars." "Managing," as defined by Webster, is "to have under control and direction * * * to guide." The employes in the actual charge of a train stop, start and advance it, and in so doing are running, conducting and managing it; but according to the averments of the complaint they are not in the absolute control or management of the train which they are running or conducting. On the contrary, they advance, stop and start their trains under the directions of the train dispatcher communicated to them by its station agent, to whom such directions are sent, by means of signals displayed and delivering to them the directions of the dispatcher; so that the movement of trains is directed and controlled (1) by those who direct their movements; and (2) by the employes whose duty it is to run their trains in obedience to such directions.

The orders of the train dispatcher can only become effective, and his control over trains exercised, by the agent to whom such orders are sent performing the acts which his duties require. Where he has orders for delivery to a conductor and engineer for their guidance in running their train, he is thereby charged with directing its movements in the manner his duties impose. To the extent that his duties require him to control or direct the movements of a train he is certainly "managing" it. If he fails to discharge these duties, the statute is violated. It was the duty of the agent at Swallows, when he received directions from the train dispatcher advising the conductor and engineer of the train upon which plaintiffs' son was riding that they should meet and pass the train approaching from the opposite direction at Beaver instead of at Adobe, to have displayed the "stop" signal, and delivered to the conductor and engineer the

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directions he had received from the dispatcher. To this extent, and for these purposes, the train in question was under his control. The object of the directions sent to him was to prevent the collision that occurred. Had he exercised that control and direction over the train which his duties required, it would have been prevented. From the language of the statute it seems clear that it embraces an employe whose duty it is to control or direct the movement of a train.

The judgment of the district court is reversed, and the cause remanded with directions to overrule the demurrer.

Judgment reversed.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 6451.]

THE NEWS-TIMES PUBLISHING COMPANY v. DOOLITTLE. ET AL.

CONTRACTS—*Construed*—A corporation publishing certain newspapers leased a carrier's delivery route to the defendant for a term of years, agreeing to deliver to him a number of papers sufficient to supply all subscribers on the route, and the lessee agreeing to deliver them. The lease was in writing. One clause of it provided that on Monday of each week defendant should pay a certain rate for each of the different newspapers. *Held*, an absolute sale of the newspapers, the obligation to pay not depending on the carrier's ability to collect, and this interpretation of the clause in question was *held* to be fortified by other clauses requiring the carrier to investigate for himself, and determine the propriety of accepting subscriptions which might be offered, and that the carrier "shall be charged for the exact number of papers his route calls for." *Held further*, that this result is not qualified by a clause providing that if the agreement should be cancelled the carrier should "repay to the corporation all moneys collected in advance of the day of the cancellation," and that the corporation reserved the right "to collect the moneys theny owing" to the carrier—(388-394).

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2. ——*Guarantor or Surety*—A corporation publishing certain newspapers executed to Doolittle a written lease of a certain carrier's route, in several clauses, specifying the obligations and liabilities of each party.

At the foot of the paper, under the title, "Guarantee," was a writing subscribed by Doolittle and two others, whereby it was provided that in consideration of the lease the three subscribers "guarantee and obligate themselves" to the corporation, that Doolittle "shall faithfully perform each and all of the terms of the above contract, and that in case of his failure, the other subscribers, upon demand, and the presentation of an itemized statement, &c., will pay to the corporation "all damages in full," but limiting the liability of the three subscribers, "as sureties under this contract," to a sum specified. *Held*, that inasmuch as the contract of leasing, and the supplemental undertaking of the three were made at the same time, upon a single consideration, that the latter was executed by Doolittle as well as by the others, that the word surety appears, as well as the word guarantee, that all of the parties subscribed the later agreement, and all thereby obligate themselves, absolutely, to pay at a fixed time, without reference to the solvency of Doolittle, the supplemental agreement must be regarded as one of suretyship, and not of guarantee; that the subscribers were liable severally as well as jointly; and that the failure to serve a statement of the damages upon one of the sureties did not affect the liability of the other—(394-397).

3. MAXIMS—The law does not require unreasonable or impossible things—(398).

Error to Denver District Court—Hon. GREELEY W. WHITFORD, Judge.

Mr. HORACE N. HAWKINS and Mr. STEPHEN W. RYAN for plaintiff in error.

Mr. JAMES H. PERSHING and Mr. ARCHIBALD A. LEE for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This action involves the construction to be given a certain written instrument entered into by the plain-

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tiff in error, the defendants in error and one H. A. Barclay. A demurrer was sustained to the complaint; the plaintiff declined to amend. Judgment was rendered in favor of the defendants for costs. The plaintiff brings the case here for review upon error.

The complaint alleges that on the 26th day of November, 1906, a written agreement was entered into by plaintiff with the defendants and one H. A. Barclay. A copy of the agreement is set forth in the complaint. Its substance is, that the first party is the owner of certain newspapers, and leases to the second party a certain carrier's delivery route for a period of two years, and agrees to furnish a sufficient number of newspapers to supply all subscribers on said route; that the second party agrees to deliver the papers to all subscribers within said district, etc.; that he also has the right to surrender this lease at any time, upon first giving thirty days' notice.

The fourth paragraph, the meaning of which is in dispute, reads as follows:

"Fourth: The second party further agrees, on every Monday of each week, to pay the said The News-Times Publishing Company at the rate of 1 2-3 cents per copy for The Daily Rocky Mountain News, 1 1-6 cents per copy for the The Denver Times, and 2 1-2 cents per copy for The Sunday Rocky Mountain News, and he agrees to deliver said paper to all subscribers at the rate of 17 1-2 cents per week for The Rocky Mountain News, 10 cents per week for The Denver Times, and 15 cents per week for the Denver Times and The Sunday Rocky Mountain News."

By the fifth paragraph, the second party agrees to keep an original and duplicate route book containing a list of subscribers, together with all of their payments, which book it is agreed shall be the property of the first party and be turned over to it at any time desired.

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The eighth and ninth paragraphs, the meaning of which is in dispute, read:

"Eighth: It is further agreed that delivery will be made by the carrier on all office orders three days before carrier makes any inquiry of the subscribers concerning such office order. That a report must then be made promptly on such order, by the carrier, and if the order is considered good, the carrier will endorse the same 'O. K.,' but if bad, the carrier must state why it is returned as not good. The carrier agrees never to return an order back as N. G., until he has seen the person named in the order, and that he will not accept a statement of some one else.

It is further agreed that all deliveries shall begin on the morning or evening the order is received by the carrier, and that there will be no delay in the carrier making the investigation.

Ninth: It is agreed that the party of the second part shall be charged for the exact number of papers his route calls for, adding all new orders and deducting all stops. If the list does not agree with the orders and stops received at the office or reported by the carrier, it will be corrected, and charge made for the proper number of papers."

The tenth paragraph provides, that the second party will confine his delivery within the limits of said route; that all copies to be delivered free will be ordered by the business office and due credit allowed; that no copy shall be delivered free without such order.

By the eleventh paragraph the second party agrees to observe the regulation subscription rates of the papers, and to use the authorized form of bill or receipt adopted by the first party.

The fourteenth paragraph, the meaning of which is in dispute, reads:

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"Fourteenth: It is further agreed that, should this agreement be cancelled for any reason whatever, the party of the second part is to repay to the party of the first part all moneys collected in advance of said date of cancellation, and the party of the first part reserves the right, if it so elects, to collect the moneys then owing the party of the second part and to account for the same without cost to said party of the second part."

It is also agreed that the first party shall have the right, should the second party violate any of the foregoing agreements, to cancel the lease. Then follows the signature of The News-Times Publishing Company, by MacDonald, also that of Henry I. Doolittle. Following these signatures, and as alleged by the complaint as a part of the same instrument, is the following:

"GUARANTEE.

In consideration of The News-Times Publishing Company leasing to H. I. Doolittle Route No. 28 as above set forth, the undersigned, H. I. Doolittle, Agent, and J. Simon and H. A. Barclay, sureties, hereby guarantee and obligate themselves to the said The News-Times Publishing Company that the said H. I. Doolittle shall promptly and faithfully carry out and perform each and all of the terms of the above contract to be by him performed. In the event of the failure upon the part of the said H. I. Doolittle to fulfill each and every obligation of said contract to be fulfilled and performed by him, then we, the undersigned J. Simon and H. A. Barclay, sureties, will immediately and upon demand and the presentation of an itemized statement of damages, pay to the said The News-Times Publishing Company all damages in full that may be sustained by them on account of such failure or neglect of said H. I. Doolittle to fulfill and perform his obligations in the said contract contained. That the liability of the

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said H. I. Doolittle, agent, J. Simon and H. A. Barclay, as sureties, under this contract, shall not exceed the sum of One Hundred and Fifty Dollars.

Dated at Denver this 26th day of November, A. D. 1906.

HENRY I. DOOLITTLE, Agent.
JOHN SIMON, Surety.
H. A. BARCLAY, Surety.

Witness: HENRY I. DOOLITTLE."

The complaint then alleges that the plaintiff complied with the contract and furnished Doolittle the papers agreed to be furnished, but that Doolittle did not perform the terms of the contract to be performed by him, in that he purchased of the plaintiff, and there were delivered to him, between the 28th day of July, 1907, and the 11th day of September following, 2,723 copies of The News and 8,108 copies of The Times, for which, under said contract, he agreed to and should have paid the plaintiff $158.30, but upon which he only paid (after allowing all credits) $38.55, leaving a balance of $119.75 due, owing and unpaid the plaintiff. The complaint further alleges, that because of said failure of said Doolittle to comply with said contract, the plaintiff cancelled it and presented to the defendant John Simon an itemized statement of the number of papers delivered to Doolittle under said contract, which statement it is alleged shows the amount due, all payments, itemized damages, and demand from him for the payment of said amount, etc. It was further alleged that the plaintiff had been unable to obtain service of said statement on the said H. A. Barclay because of his having been and now being absent from the state of Colorado.

This presents three questions for determination. First, did the complaint state a cause of action against

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the defendant Doolittle? Second, were the signers of his bond sureties for the fulfillment of his contract so that one action could be brought against all, or were they guarantors only to the extent that a separate action would have to be brought against them after plaintiff had exhausted his remedy against the principal? Third, did the failure of the plaintiff to make a demand and serve an itemized statement of its damages upon the singer Barclay, as provided for in the contract, release the obligation of the defendant Simon?

It is contended by the defendants that no breach entitling the plaintiff to cancel its contract is charged in the complaint, in this, that there are no allegations that the defendant Doolittle has failed to turn over any moneys collected; that, per the terms of the contract, Doolittle purchased no papers and was only holding for such moneys as he had collected from the subscribers, including moneys collected in advance, in case of the cancellation of the contract. In other words, that under the contract the plaintiff was not to be paid for its newspapers until the carrier collected it from the respective subscribers.

We find nothing in the contract to support this contention. Paragraph four provided that the carrier was to pay for the papers supplied him at specified prices; that he was to pay for his papers every week. This was an absolute sale of the papers to the carrier; payment was not contingent upon the carrier's ability to collect from the parties to whom the papers were delivered. This position is strengthened by paragraphs eight and nine, wherein it is provided, that orders received for that route from the office should be delivered three days before the carrier makes inquiries of the subscribers concerning such office order; that a report should then be made to the office, if he, the carrier, considered them good, but if bad he would give

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his reasons as to why it was returned not good. The ninth paragraph provides that the carrier should be charged for the exact numbers of papers his route calls for, thus showing conclusively when the paragraphs are all considered together that the papers were sold to the carrier who assumed the responsibility of collecting his money from the person to whom he delivered. Further, it will be observed that he was not working upon a salary or commission basis, neither was provided. On the other hand, he was to receive his papers at a certain price, payable at certain stipulated periods. No provision was made that these payments were contingent upon his ability to collect from his patrons. We do not think these conditions are in any way qualified by paragraph fourteen, which, as we read it, was intended to mean that in case of the cancellation of the contract, the carrier should repay to the company all moneys collected in advance of said date; nor by the clause which provided that the company, if it so elected, could collect the moneys then owing to the carrier, provided it cared to do so, without cost to him. The first clause in paragraph fourteen tends to sustain our views; it evidently means that while the contract continues in force the carrier may collect for subscription in advance, although by the terms of paragraph four, he need not at that time turn that money over to the company, but only such as is necessary to pay for the papers actually received at the price to be paid by him, but in the event of a cancellation of the contract, then this advance money paid by subscribers should be accounted for, because he had given nothing for it and the reputation of the company would, of necessity, require it to see that the carrier's contract with the subscriber was fulfilled, eliminating any question of a legal liability to do so. The second clause in paragraph fourteen, which provides that it was entitled to make the collections then

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owing to him if it so desired, was simply an additional security or protection in order to receive payment for its papers, but in no way relieved him of his obligation until the company was paid.

As the complaint states a cause of action against Doolittle, what is the nature of the liability of Simon and Barclay? Is it a contract of strict guaranty or contract of suretyship? There is often considerable difficulty in determining the exact difference between contracts of strict guaranty and of suretyship or in harmonizing the conflicting decisions upon the subject.

In Brandt on Suretyship and Guaranty, Vol. 1, (3rd Ed.) Section 2, it is said:

"The words surety and guarantor are often used indiscriminately as synonymous terms; but while a surety and a guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually the surety will not be discharged, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not the guarantor's contract, and the guarantor is not bound to take notice of its non-performance. The guarantor is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of

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the default of the principal. 'The rules of the common law as to sureties are not strictly applied to guarantors, but rather the rules of the law merchant, and the true distinction seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsible, and his contracts are often specialties, while a guarantor is only liable when default is made by the party whose undertaking is guaranteed, and his agreement is one of simple contract.' The principal and surety, being directly and equally bound, may be sued jointly in the same suit, while the guarantor, being bound by a separate contract and only collaterally liable, can not usually be joined in the same suit with the principal."

In Volume 14, American and English Encyclopedia of Law, (2nd Ed.), page 1130, it is said:

"The contract of a guarantor is a separate contract. The contract is in the nature of a warranty by him that the principal will perform his contract, and not jointly with him that it will be done. He has to answer for the consequences of his principal's default. He is not bound to take notice of non-performance. If the creditor does not give notice of a default and the guarantor is damaged, he is thereby discharged to the amount of the damage. A surety is an insurer of the debt. A guarantor is an insurer of the solvency of the debtor. A surety may be sued as promisor, but a guarantor cannot. A principal and a surety, being equally bound, may be joined in the same suit; but a guarantor, being bound by a separate contract, must be sued separately."

In the case of *Kearnes v. Montgomery*, 4 W. Va. 40, it is said:

"The contract of a guarantor is collateral and secondary. It differs in that respect generally, from the contract of a surety which is direct; and in general the guarantor contracts to pay if, by the use of

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due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default."

In the case of *McMillan and others v. The Bull's Head Bank*, 32 Ind. at page 15, it is said:

"There is no case in the books, to our knowledge, and some pains has been bestowed in their examination, in which one contracting jointly with the principal debtor has been deemed a guarantor and allowed to avail himself of such defenses as are peculiar to that character."

Applying these principles to the instrument sued upon, the conclusion must be that it is not a guaranty, but a suretyship on the part of Simon and Barclay. It is not their separate undertaking made at a different time, and for another consideration other than that coming from the principal, the principal also executes it. It was all done at one time, one consideration and one purpose, and while they employ the word "guaranty" they also use the word "surety." They directly obligate themselves to pay, absolutely and wholly irrespective of Doolittle's solvency or insolvency, all damages which may result to the obligee from his default; not only this, but they expressly stipulate as to the time when they will pay, which is immediately upon demand and presentation of an itemized statement of the damages. The instrument does not state that payment by them is conditional only in case it is not made by Doolittle, nor that it is necessary that the company exhaust its remedies against him before proceeding against them. It is a primary undertaking on their part (not secondary and collateral) to pay to the company in the event of the failure upon the part of Doolittle to fulfill each and every obligation in said contract.

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When this instrument is construed as a whole, the only conclusion which we can come to is, that they are sureties of Doolittle, and not his guarantors, and that their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter. Quite similar instruments were under consideration in the following cases.—*Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362; *Fidelity Mut. Life Ins. Co. v. Stegall*, 111 Pac. (Okla.) 389; *Pulaski Stave Co. v. Miller's Creek Lbr. Co.*, 128 S. W. (Ky.) 96; *Page v. White Sewing Machine Co.*, 12 Tex. Civ. App. 327.

In these cases the signers of the instruments were held as sureties and not guarantors, following the general principle that a surety is usually bound with his principal in one and the same instrument, executed at the same time, and on the same consideration; while on the other hand, the contract of the guarantor generally is his own separate undertaking in which the principal does not join, and is usually based upon some other or different consideration. The defendants being principal and surety, the plaintiff was entitled to include both in one action.

The third contention is, that as the complaint alleges the plaintiff did not make a demand or serve an itemized statement of its damages upon Barclay, the other signer, consequently his liability was not fixed and for the purposes of this suit he was released, and by such failure to give him the required notice of the default of the principal, his co-guarantor Simon was likewise released. We cannot agree with this position. These two signers were sureties and not technically guarantors. They were severally, as well as jointly, liable for the default and could be sued either jointly or severally.—Section 2528, Vol. 2, Mills' Annotated Statutes; section 13, Mills' Annotated Code;

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Fitzgerald v. Burke, 14 Colo. 559; *Doyle v. Nesting,* 37 Colo. 522.

Neither can we agree with the contention that upon account of the plaintiff's inability to serve Barclay with this demand and notice that he was in any wise released from his obligation, or that there can be gathered from this allegation any intention upon behalf of the plaintiff to release him, or that the prosecution of this suit against the defendant Simon, until the claim was satisfied, would bar the institution of an action against the signer Barclay at any time after service upon him of this demand and itemized statement. The contract did not provide that the sureties would be served with the notice of the principal's default. Under its terms there was a liability existing against them at the time of the default. The question of the notice concerns the time at which they agreed to pay, which was immediately upon the presentation of an itemized statement of the damages. The pleading shows, through no fault of the plaintiff, that it was impossible to get service upon the co-surety and for that reason it was not done; this does not allow the surety served to take advantage of it in order to defeat his obligation, and does not release him therefrom; if so, all that is necessary in such cases to defeat any liability is for one of the co-sureties to leave the country and keep his whereabouts unknown so that service can not be made upon him. The law does not require such unreasonable or impossible things. The court erred in sustaining the demurrer.

For the reasons stated, the judgment is reversed and the cause remanded with instructions to overrule the demurrer and allow the defendants time within which to further plead as they may be advised.

Reversed and remanded.

Mr. JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 6473.]

ROOT V. BARBOUR ET AL.

REAL ESTATE BROKER RIGHT TO COMMISSIONS—To entitle a real estate broker to commissions it must appear that he was the procuring cause of the sale—(404).

The evidence examined and *held* insufficient to maintain the broker's action—(403, 404).

Error to Denver District Court—HON. HUBERT L. SHATTUCK, Judge.

Mr. FRANK MCDONOUGH, SR., Mr. FRANK MCDONOUGH and CLARENCE J. MORLEY for plaintiff in error.

Messrs. DORSEY & HODGES for defendant in error.

Plaintiff in error brought suit to recover from defendants compensation at the rate of 12 1-2 cents per acre for a sale he claimed to have effected of eighteen sections of land in the vicinity of Byers. At the conclusion of the testimony, the court, on motion of defendants, directed the jury to return a verdict in their favor. Plaintiff was engaged in the real estate business, and had advertised lands for sale in Colorado quite extensively through newspapers and circulars. Among other tracts advertised was what was known as the Lapham ranch, located in the vicinity of Elizabeth. This property consisted of several thousand acres, and appears to have been owned, or in some way controlled, by plaintiff. Defendants were also engaged in the real estate business, and had listed, owned, or were interested in a tract of land near Byers, consisting of eighteen sections. Plaintiff testified that they employed him to negotiate a sale of these lands at $3.25 per acre, and agreed that if he found a purchaser, they would pay him at the rate of 12 1-2 cents per acre. One of the circular letters sent out by plaintiff was received

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by a real estate firm at Fremont, Nebraska. Evidently this circular described the Lapham tract and none other. In response to this circular, a Mr. Richards, for the firm of which he was a member, wrote to plaintiff, inquiring how long they could have, to investigate the proposition relative to the Lapham tract. To this, judging from telegrams that passed between the parties later, the plaintiff replied by letter. The telegrams mentioned consisted of one informing plaintiff that Richards and associates would arrive on a specified date, to which the plaintiff replied that he would hold the land for their inspection until their arrival at that time. Other telegrams between plaintiff and other parties apparently interested with Richards and his associates, were sent, one of which was by plaintiff, to the effect that he would pay, as a commission, one thousand dollars if a sale was made at $4.75 per acre.

Richards and his associates arrived in Denver at the time designated, and were met by the plaintiff. They went to a hotel for breakfast. After breakfast they left the hotel. Plaintiff wanted them to go to a Mr. Clow's, who had land for sale. They objected, stating that they wanted to see a Mr. Ferguson, who was the Union Pacific agent at Denver. When they arrived at Mr. Ferguson's office, the following conversation took place, as detailed by plaintiff:

"Mr. Ferguson says: "Hello, boys, what are you doing out here?" They says: "We are out looking for land." "Well," he says, "the biggest thing I know of is these 18 sections of Barbour's." He says: "Barbour has 18 sections; that is the cheapest thing in the country." That is the words. Richards turns around and says : "How is that?" And I says: "That is a good piece of land. I have never seen it, but we will go down."

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Plaintiff admits that up to this time he had not said anything to either Mr. Richards or his associates about these eighteen sections; had never called their attention to, or said anything to them about, this land; that the land described in his circular letter which Richards had received did not mention this tract; and that the letter and telegrams mentioned referred solely to the Lapham tract. He also admits that so far as he knew, they had never heard of the land until it was called to their attention by Mr. Ferguson, never did tell them that he had it listed for sale; and never offered it to them. Plaintiff says that after informing Richards and his associates that they would go down and see Mr. Barbour, Ferguson said: "I will go along with you"; and, continuing, testified: "We went down there and Barbour and Louden was out. Then Ferguson took us there and introduced us to Wantland, and so I says to Wantland: "Now, I will bring these men back in about half an hour. Tell Mr. Barbour to wait here when he comes in," and we went to the Government Bureau, and then went right back, and at that time Mr. Barbour and Mr. Louden was both there."

In response to a question, asking him to state what was then said, he testified:

"A. Yes, I told him, Mr. Barbour, they wanted to know about the 18 sections, and we sat right down and talked about it, and planned how to see my land and the 18 sections both. Q. What did you say about the 18 sections of land then? A. Why, I said I had never seen it, but I had no doubt it was a fine piece of land. I don't know just all that we did say, but I know I did say that much."

In the afternoon plaintiff, with Richards and his party, took the train for Elizabeth, for the purpose of inspecting the Lapham ranch, which is located about midway between Elizabeth and Byers. At Elizabeth plaintiff hired a livery rig which took them to the

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ranch, and then returned to Elizabeth. The following day they examined the ranch, and the next morning plaintiff hired a rig to take them to Byers. The party went to Byers to meet Louden, who had evidently arranged to take Richards and his party to examine the eighteen sections. Louden met them there and took Richards and one of his party to see the land. Plaintiff did not go with the party any further, but returned to Denver, and did not incur any expense of the trip from Byers to the eighteen sections. The Barbour tract was located beyond Byers. It is apparent from the testimony that plaintiff took Richards and his party to Byers, instead of returning via Elizabeth, pursuant to an arrangement that Louden would meet Richards and his associates there and take them to the eighteen sections, and that this arrangement was for the convenience of the Richards party.

It does not appear that plaintiff ever informed the Richards party that he had the eighteen sections for sale, and when asked what he had said to them in recommending this land, he answered: "I told them that I had never seen it, but I expected it was good; that it laid nice, and I thought it was a very good piece of land. I just talked in a general way, and tried to make both things look smooth and nice."

Evidently what he did say abut the eighteen sections, while not disparaging, was intended to induce the Richards party to purchase the Lapham ranch, rather than the eighteen sections. This conclusion is sustained by the testimony of Richards, which is not denied by the plaintiff. Richards says that what plaintiff said about the eighteen sections was rather to their discredit than credit; that he made the Lapham ranch appear to be very superior property, and that he was urging him to purchase it; that he never suggested or urged upon him the purchase of the eighteen sections.

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Lapham had taken the party to Byers from the ranch, and evidently was interested in that tract. He had interviewed the livery stable man who was to take the Richards party, with Louden, to see the eighteen sections. Regarding this, plaintiff testified that Lapham said to him: "'That livery stable man is going out there, and if you can give him a little money, he will talk and advertise the land and do us lots of good,' and I says: 'I will not object to giving a five dollar bill, if he will talk up the country.'

Q. You paid him to praise up what Mr. Lapham asked him to do? A. Mr. Lapham said he was quite a talker, and could run the country down or praise it up.

Q. Lapham gave him the directions, and you gave him the money? A. Yes."

Richards and one of his party inspected the eighteen sections, and returned to Denver. Plaintiff met them the next morning and says that he did not make any efforts then or later to sell the eighteen sections. That day they entered into contracts to buy his land. They then left him and went to the office of defendants and purchased, or entered into contracts to purchase, their land.

Mr. JUSTICE GABBERT delivered the opinion of the court.

The only question necessary to determine is, whether there is testimony tending to prove that plaintiff was the procuring cause of the sale. It is clear there is not. He never advertised it. Richards and his associates were not induced to come to Denver with a view of purchasing the eighteen sections. On the contrary, they came here at the suggestion or solicitation of plaintiff, to purchase the Lapham ranch. He never mentioned the eighteen sections until Mr. Ferguson spoke about them. He never told Richards, or

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either of his party that he had this property for sale, and never offered it to them. It was Ferguson who first informed them about it. He went with them to the office of the defendants. Plaintiff may have later introduced Richards and his associates to the defendants, but we think it is clear from the testimony that they went to the office of the latter the second time because they were interested about the eighteen sections from what Ferguson had said, and not because of anything that plaintiff may have said to them. Arrangements were made to inspect the Lapham ranch, and the eighteen sections, which would be the most convenient for the Richards party. Plaintiff took the party to inspect his property, and endeavored to induce them to purchase it, which they did. From there they went to Byers, to meet Louden, as previously arranged, who then took charge of the party, the plaintiff returning to Denver. He had never seen the eighteen sections, and consequently, could not give them any information regarding that land. The talk that Lapham had with the livery stable man at Byers was evidently for the purpose of inducing him to talk favorably about the Lapham tract. When the Richards party returned to Denver, plaintiff did not talk to them about the eighteen sections, or make any effort to sell that property to them. After entering into a contract to purchase his ranch, they left him, went to the office of the defendants and purchased their tract. In short, there is not a scintilla of evidence from which it can be inferred that anything said or done by plaintiff induced the Richards party to purchase the eighteen sections.

Before a broker is entitled to compensation for a sale of real estate, it must appear there is testimony tending to establish that by his efforts a sale was effected.—*Wheeler v. Beers*, 45 Colo. 547: *Chaffee v. Widman*, 48 Colo. 35; *Geiger v. Kiser*, 47 Colo. 297; *Babcock v. Merritt*, 1 Colo. App. 84; *Lawrence v. Weir*, 3 Colo. App. 401; *Cole v. Thornburg*, 4 Colo. App. 95.

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The judgment of the district court is affirmed.

Judgment affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 6496.]

COUNTY COURT OF DENVER ET AL. v. WATSON, ADMINISTRATOR, ET AL.

1. INHERITANCE TAX—*Appointment of Appraisers*—Under Rev. Stat. sec. 5561, where one appointed to appraise the estate of a decedent, in order to determine the inheritance tax, has made an incomplete and unsatisfactory report, the county court has jurisdiction to remove such appraiser and appoint another in his stead, because otherwise the first appointee by returning inadequate reports might frustrate or interminably delay the proceedings. The question is for that court and its action is not a ground of complaint by the heirs or administrator of the decedent—(408, 409).

2. CERTIORARI—*When the Writ Lies*—The appraiser of an intestate's estate, under the inheritance tax law, made an unsatisfactory report. The county court of its own motion vacated the appointment of such appraiser and appointed another.

Certiorari from the district court, upon petition of the administrator and heirs, to review the last appointment should be quashed on motion—(412).

Error to Denver District Court—HON. GEORGE W. ALLEN, Judge.

HON. WILLIAM H. DICKSON, attorney general, Mr. S. H. THOMPSON, JR., assistant attorney general, Hon. JOHN T. BARNETT, attorney general and Mr. JAMES H. TELLER, assistant attorney general, for plaintiffs in error.

Mr. JAMES H. PERSHING and Mr. CHARLES H. WATERMAN for defendants in error.

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Mr. JUSTICE HILL delivered the opinion of the court.

On the 11th day of June, 1907, upon the petition of William S. Watson, administrator of the estate of Walter S. Cheesman, deceased, the Honorable Moses Hallett was appointed appraiser by order of the County Court of the City and County of Denver, to appraise and fix the value of the property of which Mr. Cheesman died seized and possessed, pursuant to General Section 5561, Revised Statutes, 1908, concerning inheritance taxes. In said order the appraiser was commanded to make a report in writing of the value of said estate and such other facts in relation thereto as the court might order or require. He appears to have been furnished the necessary blanks which also called for certain other information pertaining thereto. On August 10th, 1907, the appraiser filed an incomplete report of his findings in regard to said estate.

Before any action was taken thereon, the Attorney General filed his amended petition to set aside the report of said appraiser and asked that the appraiser be required to file a new report, alleging that the original was incomplete, insufficient, and not in compliance with the law; that it failed to show whether any property was transferred in contemplation of the death; that it failed to show whether there were any deductions to be made for the purpose of finding and ascertaining the net value of the various estates left by the deceased to his heirs; that the value of several of the parcels of real property were unreasonably low; and numerous other objections to the insufficiency, incompleteness and ambiguity of the appraiser's report. The administrator and the heirs filed a demurrer to this petition; at the same time they filed a petition of their won, asking that the county court forthwith fix the inheritance tax upon the report of the appraiser. The court overruled the demurrer of the administrator

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and heirs, and also denied their petition, as well as that of the Attorney General, and, upon his own motion, vacated the order appointing Judge Hallett as such appraiser, on the ground that his report was insufficient and not in compliance with the law, and that the court could not determine therefrom the amount of the inheritance tax to be fixed against said estate. The court further ordered that Frederick J. Chamberlin be appointed the appraiser in said matter. Counsel for the administrator and heirs then gave notice of an appeal from said order. The appeal was denied on the ground that the order entered was interlocutory, in no way final and therefore not appealable.

Counsel for the administrator and the heirs then went before the district court, upon their behalf and not for the appraiser, and made application for a writ of *certiorari* directed to the county court alleging that it had exceeded its jurisdiction in removing Judge Hallett as appraiser and in the appointment of another, and that there was no appeal from said order and no plain, speedy or adequate remedy at law. The district court made a rule to show cause upon the county court and the judge thereof. The county court and its judge in response thereto filed a motion to set aside the rule to show cause for the reasons: First, that the district court did not have jurisdiction to review the order of the county court. Second, that the distictr court had no jurisdiction of the subject-matter set forth in the petition, and for the further reason that no proper party was applying for the writ of *certiorari* prayed for by the administrator and heirs. This motion was denied. Thereupon, the county court and the judge thereof filed a demurrer alleging lack of jurisdiction; that the parties applying had no beneficial interest; that all questions could be heard on appeal; that petitioners had a plain, speedy and adequate remedy at law; that the order was interlocutory

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and not final; that there was a misjoinder of parties. The demurrer was overruled; the writ issued; the respondent made answer composed of the transcript of the record in the county court and other matters. The petitioners filed a motion to strike that part of respondent's return not included in the transcript of record from the county court; the same was granted and judgment was entered in accordance with the prayer of the petition. The respondent, through the Attorney General, brings the case here for review upon error.

Eliminating the questions of the proper parties being before the district court, or that the application was prematurely made, or that the petitioners had an adequate remedy at law, or any of the many other questions raised which challenge the right of the district court to issue the writ, we are of opinion that the county court was acting within its jurisdiction in the appointment of the second appraiser and that the writ of *certiorari* should have been quashed for that reason alone.

Conceding that the inheritance tax statute confers aspecial jurisdiction upon the county court and that otherwise it has no general powers or jurisdiction in such proceedings, yet we can not agree, as contended for, that the county court was without jurisdiction to appoint a second appraiser.

Section 5561, Revised Statutes, 1908, in part reads:

"In order to fix the value of property of persons whose estate shall be subject to the payment of said tax, the county judge, on the application of any persons interested in the estate, including the state, or upon his own motion, shall appoint some competent person as appraiser as often as, or whenever occasion may require, whose duty it shall be," etc.

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By this language, taking into consideration what was sought to be accomplished, the appointment of the second appraiser was a question for the county court to determine; if, in his judgment, the occasion had arisen when he should appoint another appraiser, that was a question for him to determine, and, under the circumstances shown, we do not think it was subject to complaint upon behalf of the administrator or heirs of the estate. If this language "as often as, or whenever occasion may require," is not susceptible of this construction, then we are unable to understand what it is there for. It will be observed that the report of the appraiser is simply advisory to the court whose duty it is, ultimately, to fix the value of the property and the tax to which the same is liable, etc., and it is from these matters, when so fixed, that the party aggrieved has the right to an appeal. In this action the findings of the county court are to the effect that the report so returned by the appraiser was insufficient, not in compliance with the law, and that the court could not therefrom determine the amount of the inheritance tax to be fixed against said estate. From which finding, as we view it, the trial court was then of the opinion that upon account thereof the occasion had arisen when it was necessary that he should appoint another person as appraiser, and we think the language used "as often as, or whenever occasion may require," when this entire act is considered gives to the county court (in the exercise of a sound discretion) this power; otherwise, the first appointee could block the entire course of procedure, not necessarily by refusing to report at all, but by returning such reports as would not give to the court the necessary information, or in returning inadequate reports, or such as would show upon their face a lack of good faith in the performance of such duties, or in many other ways where it could not consistently be contended that the

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court was not possessed with the power to appoint another. And, while it is true the authorities hold that this act provides a special method to determine and fix the amount of the inheritance tax, and to this extent confers a special jurisdiction upon the county court, yet they do not go to the extent of holding that these acts are to be given such a literal construction as would defeat the ends sought to be accomplished. For instance, in *Matter of O'Donohue*, 44 App. Div., N. Y. 186, under a somewhat similar act where the statute provided that the appraiser should be appointed upon petition, it was held that the jurisdiction of the surrogate to appoint an appraiser is one that may be exercised with or without a petition and of his own motion wherever, in the sound exercise of his discretion, he deems it proper to do so, regardless of the language of the statute which states it shall be done upon petition, etc., in which case the court said that a tax is not imposed by the appointment of an appraiser nor even by the surrogate, that the tax in reality is imposed by the act itself.

The facts in the cases relied upon by the plaintiffs in error under somewhat similar statutes are entirely different from those here. For instance, in In Re Estate of Joseph J. Lawrence, 96 App. Div., N. Y. 29, the report of the appraiser had been received and confirmed by the surrogate court, from which no appeal had been taken. Over four years thereafter another appraiser was appointed to ascertain and fix the tax on such estate. About three years thereafter he made a report which the opinion states, "It does not appear that any order was ever made confirming this report." About two months thereafter another appraiser was appointed for the same purpose; two years thereafter he made a report in which he found certain property was subject to tax. In this case it was held that the report made by the first appraiser (which was con-

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firmed by an order of the surrogate court from which no appeal was taken), precludes subsequent action to determine and fix the transfer tax until the happening of one of the other of the events specified (which terminates such trust estates), and, as the situation was precisely what it was when the first order of approval was made, it was, in effect, a final determination of the subject and effectually binding (there being no change in the estate) upon the comptroller and executor so long as it remained in force; that the order was not appealed from and could not be avoided by instituting a new proceeding.

In the case of the *Estate of Wm. B. Moneypenny*, 181 Pa. St. 309, an appraiser was appointed in the year 1884 and the inheritance tax on personal property assessed and paid; no appeal was taken. Nearly twelve years afterwards a new appraiser was appointed and made an appraisement of the proceeds of real estate in the city of New York, which it appears had been sold by the executors under the directions of the will upon the expiration of certain life estates. The ground of this second appraisement was that the New York land had been converted into personalty by the testator's directions to sell, and that the first appraiser had omitted it. It was held that this could not be done; that the plain statutory remedy for such a case is not a second appraisement, but an appeal from the first, and that when this is not done, the commonwealth can not come in many years thereafter and secure a new or additional appraisement in order to recover additional tax.

Thus it will be observed that this line of cases is not in harmony with the facts here where it is shown that the court had not yet made an appraisement but stated his inability to do so from the report of this appraiser. It is the appraisement itself, and the tax, when fixed, that the administrator and heirs are interested

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in, and not in the personnel of the appraiser who makes his report to the court for the benefit of the court as provided for by the act. For aught that appears from this record, the report of the second appraiser as to valuations might be less than that of the first upon the properties which the first appraiser attempted to value, and those interested might be benefited thereby. In any event, the court was entitled to have a report of sufficient fullness, covering such facts as required by the statute, as well as the other information desired and called for, upon which, in his judgment, he could act intelligently.

For the reasons stated the judgment is reversed and the cause remanded with instructions to the district court to quash the writ and dismiss the action.

Reversed with instructions.

Decision *en banc.*

Mr. JUSTICE GABBERT dissents.

CHIEF JUSTICE CAMPBELL not participating.

Mr. JUSTICE GABBERT dissenting:

The statute involved provides: "In order to fix the value of property of persons whose estate shall be subject to the payment of said tax, the county judge, on the application of any persons interested in the estate, including the state, or upon its own motion, shall appoint some competent person as appraiser as often as, or whenever occasion may require, * * *."

It then provides that the appraiser so appointed shall appraise the property of the estate at its fair market value, and that from this report, and the data which the appraiser is authorized to collect and submit, and such other facts regarding the estate as the county court may direct to be filed, the county court shall make an order and fix the cash value of the estate, and

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the tax to which the same is liable. It further provides that "Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the district court of the proper county, within sixty days after making or filing of such appraisement or assessment, on giving good and sufficient security to the satisfaction of the county judge to pay all costs, together with whatever tax shall be fixed by the county court."

It thus appears that the statute provides a special method to determine and fix the amount of the inheritance tax to be assessed against an estate. To this end, a special jurisdiction is conferred upon the county court. It has no general powers or jurisdiction in such proceedings. The only authority it can exercise is to be found in the statute itself, and if it goes beyond the authority thus conferred, it exceeds its jurisdiction.—*In re Smith*, 40 N. Y. (App. Div.) 480; *In re Crerar*, 56 N. Y. (App. Div.) 479; *Estate of Moneypenny*, 181 Pa. St. 309; *Belcher's Estate*, 12 Pa. Dist. Rep. 774.

By the statute in question, an appraiser is to be appointed whose duty it is to make a report fixing the value of the property upon which the tax is to be imposed. From this report the county court determines the cash value of the estate and fixes the amount of the tax for which it is liable. Interested parties dissatisfied with the appraisement or assessment may appeal therefrom to the district court. In the case at bar the report was filed. It was attacked by a petition upon grounds to the effect that it was incomplete and insufficient, and not in compliance with the law in particulars specified; that the valuations fixed were unreasonably low; that personal property of great value had been omitted, and that it was unintelligible, ambiguous and uncertain. To support this petition, leave was asked to introduce testimony before the appraiser at a time to be fixed for that purpose. The statute does not provide for such procedure. The remedy of

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the petitioner as prescribed by the statute if dissatisfied with the appraisement because of the alleged omissions of property which should have been listed, or the valuations of that returned, was by appeal to the district court. No other remedy is provided, and being a special proceeding, the remedy prescribed was the only one that could be followed. Consequently, it follows, as of course, that the county court was without authority to enter an order which would permit petitioner to investigate alleged under-valuations and omissions in any other manner than the method prescribed by the statute. *Belcher's Estate, supra; Estate of Moneypenny, supra.*

For the purposes of this case it may be conceded that for ambiguity and uncertainties, the county court had authority to direct that the report be corrected in these respects, and that by virtue of the statute, the appraiser could have been required to report such facts relating to the estate, not incorporated in his report or otherwise returned, as the county court specifically directed, and had authority to direct; and on failure of the appraiser to comply with such order or orders, the court could remove him. It may also be conceded that for fraud or collusion on the part of the appraiser, the court possessed the inherent authority to remove him; but none of these features or that of insubordination, were presented, and the court was, therefore, without authority to enter an order removing the appraiser and appointing another, the effect of which was to permit the petitioner by a new appraisement, to attempt to correct alleged errors which could only be investigated by an appeal to the district court. That was the only remedy which the statute provides under the facts of this case; hence, it appears that the county court acted in excess of its authority, when it removed Judge Hallett and appointed Mr. Chamberlain. This conclusion is fully supported by the cases above cited,

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wherein statutes for all practical purposes the same as ours, were involved.

It is true, the statute provides that the county judge "shall appoint some competent person as appraiser as often as, or whenever occasion may require;" but this authority cannot be exercised in such manner, and under circumstances, the effect of which is to undertake to correct alleged omissions and undervaluations, which, according to the plain intent of the statute, can only be inquired into and corrected by appeal. The part of the statute last quoted, and upon which the majority opinion appears to be based, was intended to authorize the appointment of a second, or other, appraiser under circumstances entirely different from those presented here.

The judgment of the district court should be affirmed.

[No. 6552.]

WESTERN ELECTRICAL COMPANY v. PICKETT ET AL.

1. LIMITATIONS—*Suspension of Statute by Suit*—Under Rev. Stat. Sec. 904 the attempted institution of an action in the courts of Colorado by a corporation organized under the laws of another state, which has not paid the privilege fee imposed by the statute, has not the effect to stay the course of the statute of limitations. When the statutory period has elapsed the action is barred even through during the whole of that period the action appeared upon the docket of the court as a pending action, and the corporation afterwards paid the tax—(420-424).

2. LIMITATIONS—*At What Time the Plea of the Statute may be interposed*—A foreign corporation not having paid the tax required by the statute institutes an action in defiance of the prohibition contained in Rev. Stat. Sec. 904. Its right to sue is promptly questioned. The whole period of the statute of limitations is permitted to run, without payment of the tax. The defendant then pleads the statute of limitations. The plea is in time, and could not have been pleaded at an earlier date—(424).

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3. LIMITATIONS—*How to Avail of the Statute—In an Action for a Penalty*—A general denial presents the defense of the limitation prescribed by Rev. Stat. sec. 4068—(424).

Error to El Paso District Court—HON. W. S. MORRIS, Judge.

Mr. W. M. SWIFT and Mr. J. E. MCINTYRE for plaintiff in error.

Messrs. MCKESSON & LITTLE, Mr. T. C. TURNER and Mr. JOHN R. WATT for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This controversy is over the meaning to be given a portion of General Sections 904 and 910, Revised Statutes, 1908; that portion of Section 904 involved reads:

"No such corporation, joint stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or be permitted to do any business or prosecute or defend in any suit in this state until the said fee shall have been paid."

The portion of Section 910 involved, reads:

"No corporation * * * of any foreign state powers or acquire or hold any real or personal prop- or kingdom * * * shall exercise any corporate erty, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation."

On January 12th, 1906, the plaintiff in error, a non-resident corporation, attempted the institution of this action by filing its complaint and causing a summons to be issued thereon. Thereafter, first by mo-

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tion and then by answer, the defendants challenged the right of the plaintiff to prosecute this action, it being a foreign corporation, organized for pecuniary profit, was doing business in the state of Colorado, and the transactions out of which this litigation arose accrued in this state while it was doing business here. Also, the defendants pleaded the statute of limitations. The cause was tried to the court upon April 4th, 1908, upon an agreed statement of facts together with a special demurrer. Judgment was for the defendants for costs. The plaintiff brings the case here for review upon error.

The allegations of the complaint and the admitted facts justify the conclusion, that the plaintiff was a non-resident corporation organized for pecuniary profit; that it was doing business in this state within the meaning of the statute; that all the transactions involved transpired in this state so that no questions of interstate commerce, comity between sister states, or otherwise, are involved.

The record discloses that at the time the original complaint was filed (on January 12, 1906) the action was not then barred by the statute of limitations, but would have been on the 10th day of July, 1906, unless, by some action of the plaintiff, its operation was suspended.

On March 7th, 1906, the defendants, by motion, raised the question of the right of the plaintiff to prosecute this action, it not having then complied with the statute. This motion appears to have been overruled. Thereafter, and on the 16th of July, 1906, the defendants by answer raised the same question. On June 22nd, 1907, which was before final trial, the plaintiff complied with the laws of Colorado in respect to foreign corporations.

This presents three questions for consideration. First, did the plaintiff, it not having then complied

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with our laws, have a right to institute this suit or proceed with any steps in its prosecution after its right to do so was challenged? Second, did the plaintiff have the right to proceed with the prosecution of its suit after it was challenged, by thereby complying with the laws of this state in respect to foreign corporations? Third, if the plaintiff had the right to proceed with the prosecution of its action by thereafter complying with the laws of this state in respect to foreign corporations, did the attempted institution of its action in January, 1906, have the effect to at that time suspend the operation of the statute of limitations and keep it so suspended until it thereafter complied with the law, or did it continue to run in favor of the defendants until the law in this respect, was complied with by the non-resident corporation?

If the last question is answered in the negative, it makes unnecessary any decision upon the first two. There seems to be an irreconcilable conflict of authorities upon the entire question of such statutes. One line of authorities holds that all such contracts made by foreign corporations doing business in this state prior to the compliance with the act, are void and cannot thereafter, or at all, be enforced.—Section 7950, Vol. 6, 1st Ed., Thompson on Corporations.

Another line of cases holds that contracts made by such corporation while doing business in this state with citizens of the state, before complying with such conditions, are not absolutely void, but the statute merely operates to suspend the remedy of the foreign corporation in the courts of the state upon such contracts until it shall have complied with the statutory conditions. This is upon the theory that until such compliance, an action by the foreign corporation to enforce the contract is prematurely brought, so that an answer setting up the non-compliance by the foreign corporation would be an answer in the nature of a

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plea in abatement, and judgment in favor of the defendant would operate merely to abate the suit.—Section 7956, Thompson on Corporations, Vol. 6, 1st Ed.

This court appears to be committed to this last line of authorities upon the question that such contracts are not absolutely void.—*Utley et al. v. The Clark-Gardner L. M. Co.*, 4 Colo. 369; *Fritts v. Palmer*, 132 U. S. 282; *The International Trust Co. v. Leschen & Sons Co.*, 11 Colo. 299.

Other well reasoned cases, under similar statutes, seem to take the view that the plea in abatement is good, and upon account thereof an action instituted prior to a compliance with the act should be dismissed and the plaintiff be compelled to comply with the provisions of the statute, and then to institute a new suit in order to be allowed to prosecute its alleged cause of action.

In the case of *Caesar v. Capell*, 83 Fed. 403, in commenting upon a somewhat similar statute of the State of Tennessee, the court, speaking through Mr. Justice Hammond, quoted with approval from Vol. 6 Thompson on Corporations, as follows:

"A failure to comply with the regulations of the statute does not make the contract absolutely void, but only operates to suspend the remedy until such time as the foreign insurance company shall comply with the statute; that until such compliance should take place any suit brought to enforce the contract would be only prematurely brought, and a plea setting up the defense should be, not a plea in bar because of the invalidity of the contract, but only a plea in abatement to dismiss that particular suit."

To the same effect is *Crefeld Mills v. Goddard*, 69 Fed. 141, where it was held that the effect of such a statute is not to invalidate contracts made in the state by a foreign corporation doing business there without a certificate, but only to suspend the remedy

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until such certificate has been procured. The New York act involved in that case states, in substance, that no foreign corporation shall do business in that state without having first procured from the secretary of state a certificate, etc., and further, that no such corporation doing business in that state without such certificate shall maintain an action in the state upon any contract made by it in that state until it shall have procured such certificate. In which case, the court also said:

"In many cases the delay to which a delinquent corporation would be subjected while endeavoring to secure a certificate might be injurious, and perhaps fatal, to its remedy upon a contract; and, doubtless, the legislature was of the opinion that the suspension of the remedy during the interim would furnish a sufficient incentive to coerce a compliance with the law."

To the same effect is the cause of *Neuchatel Asphalte Co., Limited, v. Mayor, etc., of New York,* 49 N. E. 1043.

But it is unnecessary to determine whether or not the plaintiff, by complying with the act after the question was raised, had a right to continue the same action thereafter. The only question necessary to determine is, was the running of the statute of limitation suspended by the attempted institution of the suit before compliance with the act? We answer in the negative. Our statute, in substance, says, that no such corporation shall do business until this fee is paid and other acts complied with. It does not state that any contracts so made shall be absolutely void, but it does state, positively, that no such delinquent corporation shall prosecute or defend in any suit until the act is so complied with, and we think, as here used, the word "prosecute" includes the institution of the suit.

The Standard Dictionary defines "prosecute" "to bring suit against, in a court, for redress of wrong or

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punishment of a crime; to carry on a judicial proceeding against, as to prosecute a criminal; to seek to enforce or obtain as a claim or right, by legal process; to begin and carry on a legal proceeding."

Webster defines "prosecute" "To seek to obtain by legal process; the instituting and carrying on of a suit in a court of law or equity."

The Universal Dictionary defines "prosecution" "The instituting and carrying on of a suit in a court of law or equity to obtain some right, or redress and punish an injury or wrong."

In *Hickox v. Elliott,* 22 Fed. 19, the word "prosecute" as there employed in a code of civil procedure was held to mean in the sense of "commence."

With these definitions in mind and the sense in which the word appears to be used in these sections, it seems to us that no other construction can be placed on the word "prosecute" than to construe it as a prohibition against the bringing of an action, for the bringing of an action is certainly one of the necessary steps in its prosecution. This conclusion appears to be supported by the great weight of authority.—*Merchants' Insurance Co. v. Lacroix,* 35 Texas 249; *Heilman Brewing Co. v. Piemeisl,* 88 N. W. (Minn.) 441; *J. Walter Thompson Co. v. Whitehed,* 185 Ill. 454; *Cary-Lombard Lumber Co. v. Thomas,* 92 Tenn. 587; *Ehrhardt v. Robertson Bros.,* 78 Mo. App. 404; *Am. Copying Co. v. Eureka Bazaar,* 9 L. R. A. (S. D.) 1176.

To hold otherwise and give it the construction urged on behalf of the plaintiff would invite and foster the very evil it was intended to prevent. It would enable foreign corporations not only to do business in this state in defiance of our laws, but also to prosecute its suits for the enforcements of such business until some party perchance pleaded its non-compliance in an action brought by it to enforce a demand against him, then it would comply with the act, proceed with

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the action and have its validity recognized from its inception, and during the entire time it was prosecuting it in the face of a positive prohibitory act to the contrary. Such a construction is contrary to the letter and spirit of the statute, and, if adopted by the court, would directly tend to defeat the public policy sought to be enforced by its enactment. The most efficient way to compel obedience to this statute is to enforce it as it reads, and not amend it by judicial construction so as to enable foreign corporations to avoid the consequences of a non-compliance with its terms by complying after the penalties have been incurred. Compliance after the commencement of an action will not remove the bar of the statute so as to give effect and recognize the validity of the action from its inception up to the time the satute was complied with.—*J. Walter Thompson Co. v. Whitehed,* 185 Ill. 454; *Cary-Lombard Lumber Co. v. Thomas,* 92 Tenn. 587; *Ehrhardt v. Robertson Bros.,* 78 Mo. App. 404; *Tri-State Amus. Co. v. Amusement Co.,* 192 Mo. 404; *G. Heilman Brewing Co. v. Piemeisl,* 88 N. W. (Minn.) 441.

The same principle involved here was under consideration in the case of *Thompson Co. v. Whitehed, supra,* where it was held that a foreign corporation, which had not complied with the statute concerning the obtaining of a certificate authorizing it to do business in Illinois at the time of the levy of an attachment upon goods situate in that state, but in the possession of a foreign assignee for creditors, cannot be regarded as a domestic corporation, nor does it acquire any rights by virtue of its levy, since, under such circumstances, the law denies its right to maintain any action in Illinois, until it has complied with the statute. In which case, that court said:

"The provisions of that portion of section 3 of said act hereinbefore mentioned declared the appellant company should not, in consequence of such non-compli-

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ance, be permitted to maintain any suit or action, legal or equitable, in any of the courts of the state on any demand, whether arising out of contract or tort. No reason is perceived why the provisions of this act should not have full operation. Given such operation, the appellant company had no standing in the courts of Illinois to enforce a demand, and the insistence it was entitled to the privileges accorded by the policy of our law to a domestic or resident creditor is wholly untenable. It had no right to invoke action of any kind, under the laws of this state, in aid of the enforcement of any contract or the collection of any debt. It was proven the appellant company applied to the secretary of state on the 19th day of August, 1897,—which was previous to the hearing of this cause,—for a certificate of compliance with the provisions of the enactment under consideration, but did not complete its application to the satisfaction of the secretary of state until September 11, 1897, upon which date it received its certificate. But its rights are to be determined (at the latest) as of the date of the levy of the writ. If it did not secure a lien upon the property in dispute by the levy of the writ of attachment it was powerless to interfere with the possession and control of the goods by the assignee. It had not then complied with the conditions fixed by the statute as a prerequisite to its right to invoke the aid of the courts of this state, and the right of the appellee assignee to retain the possession of the goods was superior to any right which could be obtained by the appellant company by virtue of the writ issued in a suit which it had no legal standing to institute."

We think this reasoning applicable here. To hold that the attempted institution of the action, without first complying with the law, suspended the running of the statute of limitations against the claim, when the law provides that it shall institute no such action

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without first paying the fee, would be to abrogate the only inconvenience or penalty which has been placed upon the non-resident corporation for its failure to comply with the provisions of the act and its violation of our law.

We conclude that the running of the statute of limitation was not barred until the plaintiff had the right to, and had lawfully instituted its action in the courts of Colorado; in other words, its attempted institution of the suit when the laws of this state provide specifically that it shall have no right to prosecute any suit until the fees are paid, is the institution of no suit at all. This being the penalty provided, to recognize the validity of the suit to the extent of allowing it to stop the running of the statute of limitations, would be to relieve the plaintiff of the only penalty or prohibition which the legislature has seen fit to place upon it for its non-compliance with the laws of our state, to-wit, that it shall not be allowed to prosecute or defend until it has complied with the provisions of our statutes.

It is further urged by the plaintiff that the plea of limitation was not presented in apt time, and for that reason can not be considered. We cannot agree with this contention. This plea could not have been made at the time of the attempted institution of the original suit for the reason that the statute at that time had not yet run against the claims. The plea, however, was thereafter properly presented. The action against the defendants is for a penalty for the alleged violation of another statute upon their part, and under the ruling in the case of *The Atchison, Topeka & Santa Fe R. R. Co. v. Tanner*, 19 Colo. 559, the defendants were entitled to the benefit of the statute under a plea denying the plaintiff's cause of action which depended upon its being brought within one year

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next after the offense was committed, it being covered by General Section 4068, Revised Statutes, 1908.

The judgment is affirmed.

Affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

[No. 6556.]

THE UNITED STATES OF AMERICA, ETC., v. MCPHEE, ET AL.

STATUTES—*Construction—Retroactive Effect*—A statute will not be construed as retrospective in its operation, even where there is no constitutional prohibition upon such legislation, unless it is clear that this was the intention of the enactment. The rule applies, as well where only the remedy is affected, as where substantive rights are involved—(431).

The act of congress of Feb. 24th, 1905 (33 Stat. par. 1, 811), has not the effect to take away the action given by the act of August 13, 1894 (28 Stat. 278), upon the bond of a contractor for public work, to one who has provided labor or material for the work. Even conceding the power of congress, the statute is not susceptible of a construction which will give it retrospective effect—(432).

Error to Montrose District Court—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. S. S. SHERMAN and Mr. ERNEST MORRIS for plaintiffs in error.

Messrs. ROGERS, ELLIS & JOHNSON and Mr. PIERPONT FULLER for defendant in error Weigele.

Messrs. DINES, DINES & HOLME for other defendants in error.

November 21, 1904, The Taylor-Moore Construction Company entered into a contract with the United

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States to construct the Gunnison tunnel. Pursuant to the requirements of the contract, and in accordance with an act of Congress, approved August 13, 1894—28 U. S. Statutes-at-Large, 278—the construction company, at the time of the execution of the contract, gave a bond to the United States conditioned that it should promptly make payments to all persons supplying labor and materials for and in the prosecution of the work of the construction of the tunnel. This bond was signed by the defendants in error, as sureties.

On or about December 1, 1904, the company entered upon the execution of this contract, and prosecuted work in the construction of the tunnel until about May 26 following, at which time it abandoned its contract, and refused to further proceed therewith, and failed to pay its debts incurred for labor employed and material contracted for and furnished to it in executing its contract. During the period it was engaged in carrying on its work, it employed a large number of laborers in its prosecution, and purchased from divers parties materials and merchandise necessary for carrying on the work, which were used for that purpose. September 11th, 1905, plaintiffs in error, who had furnished materials to the construction company or performed labor therefor in the execution of its contract, and others to whom claims for materials so furnished or labor performed had been assigned, commenced suit in the district court of Montrose county upon the bond given by the construction company to recover the value of such labor and materials.

In so far as necessary to consider, they alleged in their complaint the facts above narrated.

The act of Congress in force at the time the bond was given is as follows, and is entitled:

"An act for the protection of persons furnishing materials and labor for the construction of public works. *Be it enacted by the Senate and House of Rep-*

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resentatives of the United States of America in Congress Assembled:

That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor and furnishing affidavit to the department under the direction of which said work is being or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of such contract or bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against such contractor and sureties, and to prosecute the same to final judgment and execution: *Provided*, that such action and its prosecution shall involve the United States in no expense."

February 24, 1905, Congress passed the following amendment to that act:

"That the act entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," approved August thirteenth, eighteeen hundred and ninety-four, is hereby amended so as to read as follows: "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public

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building or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority and claim of the judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said intervenors. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under direction of which said work has been prosecuted, that labor and materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the United States, in the circuit court of the United States, in the district in which said contract

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was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his and their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* that where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later; and *provided further,* that where a suit is so instituted by a creditor, or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made a party thereto, within one year from the completion of the work under said contract, and not later.

If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court for distribution among said claimants and creditors the full amount of the surety's liability, to-wit: the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing, the surety will be relieved from further liability: *Provided further,* that in all suits instituted under the provisions of this act, such notice of the pendency of such suits, informing them of their right to intervene, as the court may order, shall be given to all known creditors, and in addition thereto, notice by publication in some newspaper of general circulation, published in the state or town where the contract is being performed for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

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To the complaint the defendants who were sureties on the bond, except Weigele, demurred. By these demurrers the jurisdiction of the court over the subject matter of the action and the sufficiency of the complaint were challenged, the contention being, as we understand the record, that by virtue of the amendment of 1905, the action was premature, and could only be maintained in the circuit court of the United States for the district of Colorado. These demurrers were overruled, and the defendants demurring ruled to answer. To their answer, so far as affirmative, a replication was filed.

Later, the defendant Weigele demurred, challenging the jurisdiction of the court over the subject matter of the action on the grounds above noted, and also raised the question of the sufficiency of the complaint. This demurrer was sustained. Plaintiffs elected to stand by their complaint, and judgment was entered, dismissing their action as to the defendant Weigele. When the cause was called for trial, the action, on motion of the defendants answering, was dismissed for want of jurisdiction. The plaintiffs have brought the case here for review on error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The bond in question was executed under the provisions of the act of 1894, and the only question we are required to determine is, whether the act of 1905 in any manner affects the right of the plaintiffs to resort to the bond. If it does, then it is because the latter act operates retrospectively. In behalf of defendants in error it is contended that the forum and procedure are governed by the amendatory act, and that the action is premature, the contract as yet not having been completed.

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Legislative enactments will not be construed as retrospective in their operation, even when permissible, unless it is clear they were intended to do so. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of parties or will affect or interfere with their antecedent rights. It is founded on the soundest principles of public policy, and its reason is manifest. Every citizen is presumed to know the law, and to enter into business engagements in accordance with its provisions. It would be manifestly unjust, even in cases where a legislative body is empowered to enact laws to some extent retroactive in effect, to take away pre-existing rights, even so far as the remedy only is concerned by judicial construction of a doubtful statute, unless it is clear that such is its purpose.—*Pittinger v. Pittinger*, 28 Colo. 308; *Edelstein v. Carlile*, 33 Colo. 54; *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Colo. 162; *Harker v. Scudder*, 15 Colo. App. 69; *Jones v. Stockgrowers' Nat'l Bank*, 17 Colo. App. 79; *United States v. Heth*, 3 Cranch 399.

Without expressing an opinion on the power of Congress to pass an act which affected the substantial rights of parties in bonds given under the original act of 1894, it is clear from a comparison of the two acts, if the later is given a retrospective effect, that it works a radical change in the rights of plaintiffs, to their great detriment. Under the act of 1894 the plaintiffs could bring suit in any court of competent jurisdiction upon default of the contractor to pay what it might be owing them for labor performed and materials furnished in executing the contract, and prosecute the same to final judgment and execution. By the amendment, if it applies, suit can only be brought in the first instance by the United States, and plaintiffs would only have the right to intervene and have their claims adjudicated in such action and judgment ren-

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dered thereon, subject, however, to the priority and claim of any judgment which might be rendered in favor of the Government upon the bond, that is, they are limited in the relief which may be given them to what is left after the claim of the Government is satisfied. If the United States fails to bring a suit upon the bond, then plaintiffs could only maintain an action in the circuit court of the United States for the district of Colorado, and then only after the expiration of six months from the time of the completion of the contract and final settlement thereon. This might compel them to wait for years before an action could be instituted by them, where, before, they had the right to sue upon the bond, to recover what the contractor was owing them, immediately upon its default. Manifestly, these changes in their rights are so radical and unjust, that the statute should not be given a construction which so alters their rights unless it is clear that it was the purpose of Congress in enacting the amendment to do so.

But the statute is not susceptible of a construction which would bring about such unjust results. Its language is prospective. It provides that "Hereafter any person or persons entering into a formal contract with the United States, etc." Clearly, this applies to the future. The amendment is not confined to procedure, if the limitation as to the forum where such suit can be brought on the bond can be regarded as a matter of procedure, but deals with substantive rights. That is to say, on the bond contemplated by the amendment, the United States is given a preference over all other creditors, and the right of laborers and material men to sue in their own behalf is suspended until after the completion of the contract and final settlement, and for six months thereafter, during which period the United States alone can sue upon the bond. These various provisions are all contained in one section; and if Con-

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gress had intended that they should govern the rights of parties in bonds executed under the act of 1894, it is reasonable to conclude that it would have still further amended the original act by providing in plain language that the amendment should apply to such bonds, and not leave it, as it now reads when fairly construed, confined to those executed after the amendment. We think the amendment has no application whatever to the bond, the obligations of which the plaintiffs are seeking to enforce by their action.

This conclusion, in our judgment, is fully supported by *Struthers, Wells & Co. v. United States*, 209 U. S. 306. Counsel for defendants in error contend that this case is distinguishable from the one at bar for the reason it appears that the rights of the plaintiffs in that action had fully accrued prior to the enactment of the amendment of 1905, and that as it does not appear from the complaint in this action that the rights of plaintiffs had attached prior to the date when the amendment took effect, that the case is not in point. What the complaint may disclose in this respect we do not regard as material. The turning point in the case is the date of the execution of the bond. It is true that in the Struthers case it is said: "That Congress did not intend that the amendment should apply to cases where the bond had already been executed, the work done, the respective rights of the parties settled, and the cause of action already in existence."

We do not understand, however, that the amendment was held inapplicable on this state of facts alone. In concluding the opinion it is said:

"Viewing the whole section, we think Congress meant that only in future cases should the provisions of the amendment apply, although some trifling portion of those provisions might be regarded technically as in the nature of procedure. It is, therefore, wiser

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to hold the entire section governed by the usual rule, and as applying only to the future."

Certainly, there is no language in the act from which it can be said that it was the intention of Congress to make it retroactive. On the contrary, its language indicates that it is prospective only. To give it a retrospective construction can only be brought about by supplying words or giving it an intendment which its whole purport does not justify, and which would bring about such unjust results that we are satisfied Congress did not intend any such consequences.

Other authorities supporting our conclusion are: *U. S. A., for Strait, v. Fidelity & Guaranty Co.*, 80 Vt. 84; *Burton v. Frank Seifert Plastic Co.*, 61 S. E. 933; *Davidson Bros. Marble Co. v. United States*, 29 Sup. Ct. Rep. 324.

The judgment of the District Court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Judgment reversed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

[No. 6575.]

HALLETT, TRUSTEE, v. BARNETT.

LANDLORD AND TENANT—*Tenant Holding Over—Acceptance of Rent—Effect*—If the tenant for a term of years holds over after the expiration of his term the landlord may eject him as a trespasser, or may waive the wrong and treat him as a tenant, at his election, either for years or from month to month. The character of the tenancy depends on the will of the landlord, and not upon that of the tenant; but if the landlord would create a tenancy other than that from year to year his purpose in that behalf must be declared at the time—(436).

An intention not expressed is without effect—(436).

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Error to Denver County Court—HON. GRANT L. HUDSON, Judge.

Mr. W. C. KINGSLEY for plaintiff in error.

Mr. H. H. HINDRY and Mr. ARTHUR F. FRIEDMAN for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

December 13, 1901, M. D. Barnett leased certain premises in the city and county of Denver, from Moses Hallett, as trustee of the estate of George W. Clayton, deceased, for a period of one year from January 1, 1902. The tenancy was evidenced by a written lease containing certain conditions, among which was the payment of a monthly rent of $70.00. Upon the date of the expiration of the aforementioned lease, and each year thereafter including the year 1904, Hallett, as trustee, executed and delivered to Barnett a like written lease of the premises, containing like terms and conditions. Upon the expiration of the last mentioned lease, no further written lease was given, but Barnett continued to occupy the premises, and to pay the same rent in monthly installments as before, which rent was accepted by Hallett through the latter's agent. This condition and relation of the parties continued until April, 1908, when Hallett undertook to terminate the tenancy by a ten days' notice to quit. Barnett, refusing possession of the premises, Hallett sought to recover the same by an action of unlawful detainer. Barnett's defense was a lease, resulting, by operation of law, from a holding over from year to year after the expiration of the term, previously granted by the last designated written lease. The evidence shows that Hallett carried on the business through an agent who was instructed to furnish written leases to all tenants; that it was the duty of the agent to prepare such leases

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for Hallett's signature, and the latter did not remember the fact that Barnett had not been furnished with a written lease, until the year immediately prior to the institution of the suit. It further shows that upon the expiration of the last designated written lease, Barnett called the attention of Hallett's agent to the fact that a lease had not been written for the ensuing year. The agent made some excuse for his neglect and promised to prepare a written lease, but forgot to do so, collecting the rent, however, thereafter each month in advance. At the close of plaintiff's evidence, defendant moved for judgment of non-suit, which was granted, and the court gave judgment accordingly. Plaintiff brings the cause here for review on writ of error.

Hallett, when testifying, was asked whether it was his intention that Barnett occupy the premises as a monthly tenant or as a yearly tenant after the expiration of the written lease, and upon objection by counsel for Barnett, was not permitted to answer. This ruling of the court is claimed by plaintiff to constitute reversible error. We can not agree with him. On the contrary, we think if it was error at all, it was error without prejudice. While the legal presumption of a renewal of the tenancy from the holding of the tenant after the expiration of a written lease, can be rebutted by a proof of a contrary intention on the part of the landlord alone—*Weber v. Powers*, 213 Ill. 370, 379, 382—that intention must be manifested presently, and when once manifested controls the rights of the parties.

It is elementary that where a tenant for a term of years remains in possession, after the expiration of the term described in the lease, without any new contract authorizing him to do so, it is optional with the landlord to treat him as a trespasser or waive the wrong of holding over, and treat him as a tenant.—

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Sears v. Smith, 3 Colo. 287, 288; *Reithman v. Brandenburg*, 7 Colo. 480.

It is equally certain, under such conditions, that "by accepting payment of a month's rent after the expiration of the term of the lease the landlord makes his election to treat the party as a tenant from year to year, upon the same terms as provided in the original lease."—*Eppstein v. Kuhn*, 225 Ill. 115, 122.

This is exactly what plaintiff did. He is bound by his own election, and he was in no wise injured by the action of the court in the premises.

The facts in the case of *Zippar v. Reppy*, 15 Colo. 260, are very similar to those in the case at bar, and the law as therein expressed demonstrates the correctness of the action of the court below. The judgment is, therefore, affirmed.

Judgment affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 6650.]

CLARK v. WALLACE.

1. DAMAGES—*Proximate and Remote*—Parties are liable only for the natural and proximate results of their acts, not for those which are remote and could not reasonably have been anticipated—(439).

2. PROXIMATE CAUSE—*When for the Court*—Where the facts are undisputed and susceptible of but one inference, what is the proximate cause of any result is for the court—(439).

The defendant induced the plaintiff's servant in charge of plaintiff's premises to leave them, and go to defendant's assistance. During the servant's absence a fire was kindled upon or near to plaintiff's premises, and was carried by the wind over his field, destroying the crop. *Held*, that neither the kindling of the fire nor the rising of the wind was occasioned by the

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servant's absence, and neither was the natural and legitimate sequence of such absence—(439).

Error to Saguache District Court—Hon. HENRY HUNTER, Judge.

Mr. CHARLES M. CORLETT and Mr. GEORGE M. CORLETT for plaintiff in error.

Mr. JAMES P. VEERKAMP for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

This writ of error was sued out to review a judgment in favor of Wallace, who was defendant below. Clark owned 160 acres of standing peas, upon which he was feeding and fattening about 1200 sheep. The sheep and peas were in charge of a herder in the employ of Clark. The herder lived there with his wife and two children. On a certain day, Wallace, who had a ranch nearby, was engaged in dipping sheep, and it became necessary for him to have more help. He caused Clark's herder to be asked to come over and help in dipping the sheep, and stated that he would pay the herder. After a time the herder came over. While he was at Wallace's, a fire started in or near Clark's field of peas. It was evidently started by the herder's wife, or boy, or both. There was a high wind blowing, and the fire soon got beyond control and extended to the field of peas and destroyed them.

Clark brought an action to recover from Wallace the damages sustained by him on account of the loss of the peas. After the evidence was in, the court instructed the jury to render a verdict in favor of Wallace, which was done, and, upon this verdict, judgment was entered against Clark. We will not stop to consider whether or not Wallace would be liable for any damage that might have resulted to Clark in con-

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sequence of the herder being induced to leave his work. If Wallace was liable for any damage at all, which we do not determine, it was only for such damage as was "the actual, natural and approximate result of the wrong committed."—*Clifford v. D., S. P. & P. R. R.*, 9 Colo. 333. "The rule is general that a person is not to be held responsible in damages for the remote consequences of his act, or indeed for any but those which are proximate or natural."—8 Am. & Eng. Ency. of Law, 561. In *D. & R. G. R. R. Co. v. Sipes*, 26 Colo. 17, it is said, that proximate cause is "that cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred;" or "that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate, or predisposing cause."

Whether an act was the proximate cause of damage, is ordinarily a question for the jury, but when the facts are undisputed and are susceptible of but one inference, the question is one of law for the court.—*D. & R. G. R. R. Co. v. Sipes, supra.* The only damage that Clark sought to recover, and of which there was any evidence, was that which he had sustained by reason of the burning of the peas. It cannot be said that the natural result of the herder's absence was that some member of his family would start a fire and that the wind would be high and would fan that fire so that it would extend to and destroy the peas. It cannot be said that the herder's absence in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of, for the setting out of the fire by his family was not a natural and continued sequence of the herder's absence, but it was an efficient, intervening cause, coming in after the absence of the herder and could not have been anticipated as a natural result of the ab-

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sence. It cannot be said that, if the herder had been present, the fire would not have been started, or the wind not have been high. The cause of the fire was not the absence of the herder, but it was plainly the action of his family, and this action was not the natural and legitimate sequence of his absence. The fire might have been started just as well with him present, on some portion of the 160 acres of peas, and the wind would have blown just as hard.

The substantial facts in this case are undisputed, but if the evidence, on the part of the plaintiff, be alone considered, there is but one inference to be drawn from it and that is, that the absence of the herder was not the proximate cause of the destruction of the peas. The judgment is, therefore, affirmed.

Judgment affirmed.

Mr. JUSTICE GABBERT and Mr. JUSTICE HILL concur.

[No. 6752.]

RICHARDSON ET AL. v. EL PASO CONSOLIDATED GOLD MINING COMPANY.

1. CONSTITUTIONAL LAW—*Police Power*—A statute requiring that "all abandoned mine shafts, pits, or other excavations, endangering the life of man or beast, shall be securely covered or fenced" (Rev. State. sec. 4297) is a legitimate exercise of the police power—(446).

2. STATUTES—*Construed*—A statute requiring that "all abandoned mine shafts, pits and other excavations endangering the life of man or beast shall be securely covered or fenced," is not so uncertain in its terms as to be incapable of enforcement. The owner of the mining claim having excavated the shaft is under duty to enclose it—(447).

And the statute extends not merely to such workings as are abandoned, in the sense that no intention to return to it or use it in the future, is entertained, but to those workings

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which are not in use for the operation of the mine from the surface—(447).

And it applies as well to workings abandoned prior to its enactment, as to those subsequently abandoned—(448).

It was intended to afford protection to the public generally, and extends even to the child of a mere licensee of the owner who resides upon the mining claim on which the shaft is situated—(447, 448).

And the statute requires, not merely that such a shaft shall be covered at the time of quitting it, but that reasonable care be exercised thereafter to maintain the cover or enclosure in reasonably safe condition—(450).

3. NEGLIGENCE—*Reasonable Care*, is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances, taking into account the dangers which are to be reasonably apprehended—(449).

4. ——*Violation of Statute*—The failure to perform a duty imposed by statute for the protection of the public is negligence *per se*—(449).

5. ——*When for the Jury*—When the evidence is conflicting or different intelligent minds may honestly draw different conclusions therefrom, the question of negligence or contributory negligence must be left to the jury—(449).

A shaft excavated upon defendant's mining claim was abandoned in 1902, and was then securely covered. It was two hundred feet in depth. In 1904 boards were laid crosswise of those which were put down in 1902, but those so originally laid were not examined. In 1906 an employe was instructed to recover all the shafts of the company, and laid new boards in place of those which were missing. He made no examination of the boards which were in place. No inspection was afterward made to determine whether this servant had complied with the order. New stringers or timbers were never put in. Within a radius of four hundred feet from the shafts were fifteen or sixteen houses occupied by families with children, to the number of about twenty, ranging from two to sixteen years of age. These children often played upon the dump of the shaft, and the superintendent of defendant had notice of this. In July, 1907, the plaintiff's son, a boy of nine years, fell into the shaft and was killed. The evidence tended to show that some of the boards were loose, some were warped and corroded by the dry rot, and that only one of them was sound. The stringers supporting them were so decayed that they would not hold a nail. It only required a slight jar to disturb the boards, and

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the child probably jumped or stepped upon a board which broke under him, or upon one which was loose. It was held a case for the jury—(449-452).

6. ——*In the Care of Children*—A parent is required to exercise for the protection of his minor child against known dangers, or dangers which by reasonable care would have been known, that degree of care which reasonably prudent persons would have exercised in the same or like circumstances. A child of nine years was sent by the mother to the close vicinity of an abandoned shaft, one board of the cover of which was loose. The parents had previously sent an older son to repair it, and he had attempted to nail down one of the boards which he found loose. The father shortly afterwards examined the cover and thought it secure. Later the mine owner made some repairs, and there was no evidence that the parents after this had notice that the cover was unsafe. *Held*, that whether the parents were guilty of negligence in the care of the child was a question to be left to the jury—(455).

7. CONTRIBUTORY NEGLIGENCE—*Of Infants*—A minor *non sui juris* is required to exercise only such care as may reasonably be expected from one of his age, experience and intelligence. A child of nine years is presumptively *non sui juris;* but the question is one of fact to be determined by all the circumstances of the case. If there is a fair doubt as to the child's capacity the question should be submitted to the jury—(453, 454).

8. PLEADING — *Certainty — Things Implied From Things Averred*—What can be reasonably inferred from the averments of a pleading need not be expressly alleged. Action for the death of a child, by its fall into an abandoned shaft, alleged not to be sufficiently covered as required by the statute. The complaint named as defendant "The El Paso Consolidated Gold Mining Company" and averred that the shaft was situated upon the Australia Lode Mining Claim, in the Cripple Creek Mining District. *Held*, that inasmuch as it was apparent from the corporate name that the defendant was engaged in mining for gold bearing ores, that the word "lode" is well understood to apply to veins of metallic ore, the complaint sufficiently disclosed that the shaft in question was upon a metalliferous mine —(445, 446).

9. EVIDENCE—*Relevancy*—Action by the parent for the death of a minor child by his falling into an abandoned shaft the cover of which was defective. Evidence that the mother ha-

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warned the child not to go upon the cover of the shaft was *held* relevant to the question of whether the parents had been negligent in caring for the child—(455).

Error to Teller District Court—HON. W. S. MORRIS, Judge.

Mr. CHARLES C. BUTLER for plaintiffs in error.

Messrs. CHINN & STRICKLER for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

On July 2, 1907, Allen Richardson, Jr., a boy of nine years, was killed by falling down a shaft belonging to the El Paso Consolidated Gold Mining Company. His parents brought suit to recover damages based upon the ground that the negligence of the defendant caused the death of their son. At the conclusion of the testimony the defendant moved the court to instruct the jury to return a verdict in its favor for the reasons:

"First: Because the pleadings are not sufficient to support a judgment in favor of the plaintiffs or either of them; and

Second: Because the evidence is not sufficient to authorize a judgment in favor of the plaintiffs, or either of them."

The motion was sustained, and plaintiffs bring the cause here for review on error.

The complaint charged that the shaft in question was abandoned: that it belonged to the defendant: that it negligently failed to securely fence or cover the shaft; that plaintiffs and their children lived within one hundred and ten feet of the shaft: that it was in close proximity to roads and highways extensively used by miners and others in going to and from their work;

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and that the ground in the near vicinity of the shaft was used by the children of the neighborhood without any objection on the part of the defendant as a playground, of which fact the defendant had notice and knowledge. It is also alleged that the defendant is a corporation created and existing under the laws of this state, and engaged in mining gold and other precious metals; that the shaft in question was located upon mining property known as the Australia lode mining claim, belonging to the defendant, and situate in the Cripple Creek Mining District.

For answer the defendant admitted the ownership of the shaft, but denied the negligence charged, and pleaded contributory negligence of deceased and his parents. It also denied that the shaft was abandoned, and alleged that long prior to July 2, 1907, it had, at the request and solely for the accommodation of the plaintiffs, and without receiving any compensation therefor, granted them permission to erect and occupy during its will and pleasure, the house wherein plaintiffs were living at the time their son was killed, which house was located on the mining premises of the defendant, about one hundred and ten feet from the shaft; that plaintiffs placed their house on the premises and commenced to reside therein with full knowledge of the condition of the premises and the shaft; that at no time during the period mentioned did the defendant alter or change the condition of the premises or shaft, and that during the whole of this time the plaintiffs, as well as deceased, were thoroughly familiar with the condition of all the shafts, dumps, excavations and paths in the immediate vicinity of their residence, and of the shaft referred to in their complaint. To these defenses, so far as affirmative, a replication was filed.

The laws of this state require—§ 18, p. 364, Laws 1903; § 4297 Rev. Stats.—"that all abandoned mine shafts, pits, or other excavations endangering the life

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of man or beast shall be securely covered or fenced." What specific questions were urged in support of the motion for a directed verdict, the record does not disclose.

On behalf of the defendant it is now contended that the complaint does not state a cause of action; that the law upon which the plaintiffs predicate their rights is unconstitutional; that the section in question is so indefinite and uncertain as to render it unenforceable; that neither deceased nor plaintiffs belong to the class of persons for whose benefit the law was enacted; that the evidence does not establish that the shaft was abandoned; that the law does not apply except as to shafts abandoned after it went into effect; and that plaintiffs were mere licensees whose rights were not violated by a failure of the defendant to protect the shaft by suitable covering or fences.

The act in question is entitled "An act to regulate the construction, equipment and operation of metalliferous mines, mills and metallurgical plants, providing penalties for violations thereof, and repealing all acts or parts of acts in conflict herewith." Based upon this title, it is urged that in the absence of an allegation that the shaft was upon a metalliferous mine, the plaintiffs have not stated a cause of action, within the provisions of the statute. Conceding that the act only applies to mines yielding metals, it is apparent from the complaint that the Australia was of this character. The name of the defendant indicates that it is engaged in mining gold ores. The complaint alleges that it is, and that defendant was the owner of a certain mining property known as "The Australia Lode Mining Claim, situate on Beacon hill, in the Cripple Creek Mining District, County of Teller, State of Colorado." The statutes of this state on the subject of mining claims located upon veins speak of them as "lode claims," which it is well understood means a mining claim con-

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taining a vein of metallic ore; so that the averment that the Australia was a lode mining claim is, in effect, an averment that it is a metalliferous mine. An express averment of a fact is not necessary, when from the complaint such fact can be inferred.

In support of the contention that the statute is unconstitutional, it is urged that the legislature is without authority to require the owner of a mining claim to keep it safe for intruders, and that doing so is, in effect, taking property for the use of another without compensation. Neither of these propositions are applicable to the facts of this case. The legislature has the power, within reasonable limits, to prescribe regulations for the safety of the public. We think the act comes within that authority. Mining claims are not enclosed by fences. Their boundaries are only usually marked by posts, one at each corner, and one at the center of each side line. They are located in the mountains in the vicinity of unoccupied and unenclosed Government lands. They are crossed and re-crossed by miners going to and from their work; by prospectors searching for other mines; in fact, by all classes of persons following their usual vocations in the vicinity where located, including children of tender years. In such circumstances, an open, unprotected shaft is a menace to life and limb. In the night-time or in a storm, persons may fall into it, or children may thoughtlessly approach too near the edge and be precipitated to the bottom. Reasonable provisions requiring an abandoned shaft to be so protected as to prevent such casualties come clearly within the police powers of the commonwealth. The statute is not unconstitutional.—*Platte & Denver C. & M. Co. v. Dowell*, 17 Colo. 376.

The claim that the statute is unenforceable for ambiguity is based upon the assumption that the person upon whom the duty rests to cover or fence an aban-

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doned shaft is not designated. The person upon whom the duty of complying with the statute devolves is the person to whom it applies. The different relations of parties to the property upon which a shaft is located might be necessary to consider in determining the person upon whom such duty is imposed. In the case at bar, however, there is no difficulty in determining that party. The defendant was the owner of the Australia, and as we understand the record, had excavated the shaft in question.

It is said the plaintiffs and deceased do not belong to the class of persons for whose benefit the law was enacted, because it was only intended to protect persons engaged in operating mines. The statute is not susceptible of so narrow a construction. On the contrary, from the very nature of mining claims, and the dangers to be guarded against from the presence of unprotected, abandoned mining shafts, it was intended to afford protection to the public generally.

It is contended that a mine shaft is not abandoned unless it appears the owner left it without any intention of again using it, and that the evidence does not establish such intention on the part of the defendant. For a long time prior to the time when the boy was killed, the defendant had not used the shaft. There is no evidence tending to prove that it had been abandoned according to the legal definition of that word, in the sense that defendant had ceased to utilize it with the intention of never using it in the future. This, however, is not the test. The intent of a statute is the law. The cardinal rule of statutory construction is to discover and enforce its intent. In construing a statute the cause and necessity for it, the object in view, and the evil which it is intended to remedy should always be taken into consideration in determining its intention; consequently, words employed should be given that meaning, when possible, which will result

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in effecting the object for which it was enacted. As we have pointed out, an uncovered and unprotected shaft is a menace to life and limb. The purpose of the legislature was to minimize danger from this source by requiring that shafts not used for working through from the surface should be protected in the manner indicated. As applied to the facts of this case, that was the character of shafts which was meant by the expression "abandoned mine shafts."

It is urged that the act, when reasonably construed, only applies to shafts abandoned after it took effect. That construction would but partially remove the danger which the statute was directed against. It cannot be so limited unless words are supplied, or the statute given a construction by implication which its plain meaning does not justify.

The evidence discloses that the father of deceased, with the consent of the defendant company, had constructed a house upon the Australia claim, which he was occupying with his family at the time of the death of his son, and that no charge was made for the use of the ground upon which the house stood, or for any part of the Australia claim. On this state of facts it is contended that plaintiffs, as well as the deceased, were mere licensees, which did not entitle either of them to the use of the dump in the immediate vicinity of the shaft, which was about one hundred and ten feet from the house; that deceased was, therefore, a trespasser when upon the dump, and at the shaft, or, if the license extended to the immediate vicinity of the shaft, which was there when the house was constructed, the defendant violated none of its obligations growing out of the relationship of owner to licensee or trespasser. The proposition is wholly inapplicable. Plaintiffs' action is not based upon the ground of a failure on the part of defendant to fulfill any obliga-

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tion which it owed them or the deceased, because they occupied a house on the Australia claim, but upon the failure of the defendant to comply with a statutory requirement the purpose of which was to protect the public from injury, which neglect, they claim, caused the death of their son.

This brings us to a discussion of the vital questions in the case, which are, does the evidence establish as a matter of law, the following propositions:

(1) That the defendant was not negligent;

(2) That deceased was guilty of negligence, or that defendant was under no duty to him in the circumstances of this case to keep the shaft covered; and

(3) That the parents were guilty of negligence which precludes their recovery.

When the questions of negligence or contributory negligence depend upon facts to be determined from conflicting evidence, or from inferences to be drawn from facts and circumstances of that character that different intelligent minds may honestly reach different conclusions, they should be left to the determination of the jury.—*Lord v. Pueblo S. & R. Co.*, 12 Colo. 390; *Empson Packing Co. v. Vaughn*, 27 Colo. 66; *D. & R. G. R. R. Co. v. Spencer, ibid* 313; *City of Denver v. Hyatt*, 28 Colo. 129; *Monarch M. & D. Co. v. DeVoe*, 36 Colo. 270; *Farrier v. Colo. Spgs. R. T. Ry. Co.*, 42 Colo. 331; *Nichols v. C., B. & Q. R. R. Co.*, 44 Colo. 501; *Denver City Tramway Co. v. Wright*, 47 Colo. 366; *Kent Mfg. Co. v. Zimmerman*, 48 Colo. 388.

Bearing in mind this rule, we will consider the questions of negligence and contributory negligence in the order indicated.

The failure to perform a statutory duty imposed by a valid statute under the police power of the state for the protection of the public is negligence *per se*.—*Platte & Denver C. & M. Co. v. Dowell*, 17 Colo. 376.

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The party upon whom such duty is imposed must not only exercise reasonable care in the first instance to comply with the requirements of the statute, but must thereafter exercise such care in complying with the statutory requirements.—*Jones v. Flint P. M. R. Co.*, 127 Mich. 198. Reasonable care is that degree of care which an ordinarily prudent person would exercise under similar circumstances, taking into consideration the dangers to be apprehended and guarded against which the statute intended to obviate. The claim upon which the shaft was located belonged to the defendant. It had constructed the shaft about two hundred feet in depth, and had ceased to use it for working from the surface for several years before the boy was killed. It was, therefore, its duty under the statute to exercise reasonable care to securely cover or fence the shaft and keep it in that condition.

The evidence appears to establish that defendant did securely cover the shaft in 1902. The boy was killed in July, 1907. From the evidence he probably jumped or stepped upon a board of the cover which broke, or on the end of one which was loose. Touching the condition of the covering immediately or shortly after his death, there is testimony to the effect that some of the boards were loose; that some were dry-rotted and warped; that none were sound except one, and that although the boards may have been originally nailed, the nails had pulled loose; that the stringers supporting them were so decayed that they would not hold the nails, and that it only required a slight jar to loosen the boards. Within a radius of four hundred feet of the shaft there were fifteen or sixteen houses, occupied by families with children aggregating in number about twenty, ranging from two to sixteen years of age. These children often played upon the dump made by the material taken out in excavating the shaft. There is evidence tending to prove that the superin-

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tendent of the company knew this fact, as he frequently passed in the near vicinity of the shaft from the time it was covered down to the date when the boy was killed. After 1904 this employe did not examine the covering personally for the purpose of ascertaining its condition. An employe of the defendant testified that in 1904 he re-covered the shaft by laying boards crosswise over those that had been put in in 1902 lengthwise. He said he did not examine the original boards for the purpose of ascertaining whether they were fastened securely, and that he did not put in any new stringers. Another employe of defendant, who had been instructed to re-cover the shafts of the company, testified that in the summer of 1906 he repaired the covering of the Australia shaft by putting on new boards in place of those missing; that at that time the shaft was practically uncovered; that he did not examine the boards that were in place for the purpose of ascertaining their thickness; did not take any of the old boards up, nor put in new stringers at either end.

Referring to these repairs, the superintendent testified (quoting from the abstract): "Did not instruct him to cover this particular shaft. As a matter of fact, do not know whether he did cover it or do anything with it at all; did not examine it to see whether he did, only in just passing it. In just passing it could see the boards were over the shaft. That was all. Assumed that the men had done their duty. * * *"

Speaking of the manner in which the boards were laid, the witness continued: "As I remember, they laid length-wise of the shaft. * * * From 1904 to 1906 it was covered lengthwise of the shaft. Do not remember ever seeing any cross-boards. They were always lengthwise, as I remember. That was so at all times up to the time the little boy was killed."

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It will be observed that the last repairs to the covering of the shaft were made about a year before the boy was killed; that the timber to which the covering was fastened had been in several years, and that after the last repairs no examination was made for the purpose of ascertaining the condition of the cover. Without further comment, we think the evidence on these subjects, in connection with that bearing on the condition of the covering at the time the boy fell into the shaft, and the danger to be anticipated from the presence of families consisting in part of children in the near vicinity, was sufficient to justify the submission to the jury of the question of whether or not the defendant had been guilty of negligence in not exercising reasonable care with respect to keeping the shaft covered, and the trial court should have done so, unless it appears from the testimony bearing on the remaining questions involved that plaintiffs cannot recover.

The deceased was nine years of age. His mother had directed him to empty some chicken feed into a hole a short distance below the Australia shaft. He had not been gone long when his mother looked out. She says, "Allen did as I told him, took the chicken feed and went to the little hole, went down that way. * * * The next time I saw Allen was when I came back into the kitchen and looked out. He was stooping over, hold of this board. He was at the end farthest away from the house. Just immediately, when I saw him bend over, he stepped forward on the board and went down, and he just called 'Mamma'!"

His brother William, who had also been sent on an errand at the same time, after explaining why he had not seen the deceased all the time after leaving the house, said: "Just as I went past the green-house, saw my brother Allen down there. Saw him stoop over. He was at the Australia then, at the end farthest away from the house. He was stooping over, like this, get-

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ting ready to place his hand on the board. He had his hands over on the board. Don't know whether he was placing the board or not. Did not see any board move."

A neighbor woman testified that "At the time of the accident, lived about two hundred feet up the slope of Beacon Hill above this Australia shaft. Was standing on the back porch stamping some pictures, when I saw Allen and Willie leave the house. As they got to the far edge of the shaft, they parted, Allen going towards the shaft and Willie going above the greenhouse, and as Allen got to the shaft I looked away, at my picture again, and when I looked again he was stooping over, holding the board, and as I thought, pulling the board over the shaft. He had hold of the board, then stepped on it, and sprang up and down several times. He did not jump. I hollered to Willie, and told him Allen fell down the shaft. * * *

"Q. Was he pulling the board? A. It looked as if he was pulling it over the shaft. He was pulling towards the west. He was on the bucket side, or the shaft side. Right after he pulled the board, he stepped on it and sprang up and down on it. The board commenced to go down with him, and it was slow in going. He almost got off, and tripped and went over. He went head first."

If the deceased had been an adult, this testimony might very well be said to have established such contributory negligence on his part as to preclude a recovery; but persons of tender years are not held to the same degree of care that a mature and experienced person is required to exercise. Minors, not *prima facie sui juris*, are required to exercise such care to avoid danger as might fairly and reasonably be expected from persons of their age. This is a question to be determined in each case by the circumstances of that case. If there is a fair doubt as to the child being of

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the age and capacity that in law it should be held responsible for the act contributing to its injury, the question should be submitted to the jury to say, by its verdict, whether this is so or not.—*Pueblo El. St. Ry. Co. v. Sherman*, 25 Colo. 114; *Denver City Tram. Co. v. Nicholas*, 35 Colo. 462; *Dempsey v. Brooklyn Heights Ry. Co.*, 98 App. Div. Rep. (N. Y.) 182; *Price v. Water Co.*, 58 Kan. 551.

The deceased, by reason of his age, was not *prima facie sui juris*. He was only required to give such attention to his surroundings, and care to avoid danger from the condition of the cover, as might fairly be expected from one of his years. The question then presented is, whether or not he was capable of appreciating the danger to which he was exposed in removing a board and attempting to replace it by stepping upon it, or upon a board partially decayed to such a degree that he should be held responsible for these acts. In the circumstances of this case, we think this was a question of fact, to be determined by the jury, and not one of law for the court.

But it is urged that defendant was not under any duty to deceased to keep the shaft covered. In a measure, at least, we have already determined this question to the contrary. Children must be expected to act upon childish instincts and impulses. They thoughtlessly expose themselves to danger. Those who are chargeable with a duty of care and caution towards them must calculate on this, and take precautions accordingly. The Australia was not enclosed. Mining claims rarely are. Artificial conditions created by the owners render the surface of such claims dangerous to those passing over them. People pass over, and children play upon them. To prevent injury to the public, including children, the General Assembly has required abandoned shafts to be covered. This, as we have said, is a valid police regulation, and the failure

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of the defendant to perform the duty imposed by statute renders it liable in this case if the death of the boy, in a substantial sense, was caused by its failure to comply with the statute.—*U. P. Ry. Co. v. McDonald*, 152 U. S. 262.

The final question relates to the alleged negligence of the parents. On behalf of the defendant it is urged that they failed in their parental duty to guard their child from a peril known to them. It was not negligence to take up their abode in a mining camp, and upon a mining claim. The most that can be claimed is, that plaintiffs were required to exercise that degree of care and caution to prevent injury to their son from known dangers, or dangers which, by the exercise of reasonable care, they could have known existed in the vicinity of their residence, which reasonably prudent persons would have exercised under similar circumstances. The record does not disclose that as a matter of law they failed to exercise such care. The mother had directed her son to empty chicken feed in a hole in the near vicinity of the shaft. She had not sent him to the shaft, neither did his errand compel him to go there. He appears to have done so of his own volition. At the trial plaintiffs sought to show that his mother had warned him not to walk on the covering of the shaft. At the instance of the defendant, this testimony was refused. Clearly, if the mother had warned her son not to walk upon the shaft covering, it would tend to prove care and caution on her part. In 1906 the covering of the shaft was out of repair, a board being loose. The parents sent an older son to repair it. He said he nailed the board, but that the stringers were not in a good condition to hold nails. The father testifies that shortly after his son repaired the covering, he examined one end of the board, and it seemed secure. Not long after this the defendant claims to have repaired the covering. The evidence

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does not disclose that plaintiffs had any knowledge that the covering was defective after this time. On this state of facts, the question of whether or not the plaintiffs were guilty of contributory negligence which was the proximate cause of the death of their son should have been submitted to the jury.

Several minor propositions have been argued by counsel for plaintiffs, which we do not deem it necessary to consider in detail. They relate to the admission and rejection of testimony. We have considered the three important questions in the case, and testimony tending to prove or disprove the issues bearing on them is competent.

The judgment of the district court is reversed and the cause remanded for a new trial.

Reversed and remanded.

Decision *en banc.*

CHIEF JUSTICE CAMPBELL not participating.

[No. 6768.]

IMPERIAL FIRE INSURANCE COMPANY V. CITY AND COUNTY OF DENVER.

CONSTITUTIONAL LAW—*Taxation—Exemptions*—The statute which assumes to relieve insurance companies from the payment of taxes upon their personalty (Laws 1907 c. 193, Secs. 16, 17, 18) is opposed to Sec. 10 Art. X of the constitution and void.

Error to Denver District Court—Hon. H. C. RIDDLE, Judge.

Messrs. BICKSLER, BENNETT & NYE for plaintiffs in error.

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Mr. MILTON SMITH, Mr. CHARLES R. BROCK and Mr. W. H. FERGUSON for defendants in error.

Plaintiff in error brought suit, the purpose of which was to enjoin the defendants from collecting, or attempting to collect, a tax assessed upon its personal property for the year 1908. In support of its alleged right to this relief, it was stated in the complaint that for the year 1908 it had paid the commissioner of insurance the sum of $711.99, which amount constituted two per cent of the gross amount of the premiums received by it within the state during the year ending December 31, 1908. Its contention that this payment relieved it from the further payment of taxes for that year, and that defendants had no authority to levy or collect taxes upon its personal property for that period, was based upon an act of the legislature entitled "An act relating to an insurance department, in and for the state of Colorado, and to regulate the insurance companies * * * and others doing business therein, providing penalties for violation thereof, and repealing all acts and parts of acts in conflict therewith." Session Laws 1907, p. 431. Section 16 of the act is as follows:

"All insurance companies engaged in the transaction of the business of insurance in this state, shall annually, on or before the first day of March in each year, pay to the commissioner of insurance two per cent (2%) on the gross amount of premiums received in this state during the year ending the previous 31st day of December. Insurance companies shall not be subject to any further taxation except on real estate and the fees provided by this act."

The act further provides (sections 17 and 18) that the funds thus realized shall be retained by the state and applied to the payment of the expenses of the insurance department, and that any excess after paying such expenses shall be transferred to the general

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fund, and used for the redemption of outstanding warrants and such other indebtedness in payment of which such fund can be applied.

To the complaint a general demurrer was interposed and sustained.

Mr. JUSTICE GABBERT delivered the opinion of the court.

Plaintiff's sole contention is, that its personal property is exempt from taxation by the county authorities by virtue of the provisions of section 16 above quoted. Section 10 of Article X of our constitution is as follows:

"All corporations in this state or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes on the real and personal property owned or used by them within the territorial limits of the authority levying the tax."

The act in question undertakes to exempt insurance companies from the payment of taxes levied by the authorities and for the purposes contemplated by this section. The taxes realized under section 16 of the act are retained by the state. If the exemption is upheld, it relieves insurance companies from paying their just and fair proportion of taxes which may be levied by county authorities for state, county, school, municipal and other purposes, and deprives the various subdivisions of the state from receiving the taxes which such authorities are authorized to levy for their benefit upon the personal property of insurance companies owned by them within the territorial limits of the authorities levying such taxes. The constitution inhibits such exemptions and inhibitions. To the extent, then, at least, that the act undertakes to exempt the personal property of insurance companies from

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taxation, by county authorities, for other than state purposes, it is invalid.

The judgment of the district court is affirmed.

Decision *en banc.* *Judgment affirmed.*

CHIEF JUSTICE CAMPBELL not participating.

[No. 7178.]

BULL ET AL. v. DOSS BROTHERS ELECTRIC CONSTRUCTION COMPANY.

1. WRIT OF ERROR—*Payment of Judgment—Effect*—Payment of the judgment pending a writ of error to review it is an abatement of the writ of error. The fact that the creditor has caused the judgment to be made a lien upon the real property of the debtor does not affect the question, even though the debtor is engaged in buying and selling land—(460).

2. PAYMENT—*Voluntary*—A judgment creditor causes the judgment to be made a lien on the lands of the debtor. The debtor in order to be able to prosecute his business of dealing in lands pays the judgment. The payment must be regarded as voluntary. The conduct of the creditor is in no sense duress —(460).

Error to Denver District Court—Hon. GREELEY W. WHITFORD, Judge.

Mr. W. W. DALE for plaintiffs in error.

Messrs. MURRAY & INGERSOLL for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

March 21, 1910, the defendant in error, as plaintiff below, recovered a judgment against plaintiffs in error, and two days thereafter, in order to make the same a lien upon the real property of the judgment

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debtors, caused a transcript of the docket entry of such judgment to be filed with the recorder of the city and county of Denver, as provided by § 251, Code of Civil Procedure, R. S. 1908. April 16, 1910, the judgment debtors, plaintiffs in error, brought the cause here for review, applied for, and secured a supersedeas, staying the execution of the judgment. Thereafter on August 22, 1910, plaintiffs in error paid the judgment and had the same satisfied of record.

Defendant in error has filed a plea in abatement, and moves to dismiss the writ, for the reason that plaintiffs in error voluntarily paid, satisfied and discharged the judgment. Plaintiffs in error maintain that the payment and satisfaction of the judgment was under duress or compulsion, and, therefore, constitutes no bar to the prosecution of the writ of error. We are unable to concur in this view of the matter. Defendant in error did nothing except that which the legislature authorized it to do. It made no illegal exactions of plaintiffs in error; indeed, no demand whatever. At the time no execution could have issued upon the judgment. The supersedeas stayed all proceedings to collect, so the judgment lien, though existing, was non-enforceable. It was no more incumbent upon plaintiffs in error to, at that time, satisfy the judgment than to liquidate an incumbrance before it became due, voluntarily placed upon their property. In either event, it might be to their interest or convenience to so do. They were engaged in buying and selling real estate, and negotiating loans thereon, and in order to more conveniently carry on that particular business, saw fit to satisfy the judgment, and remove the lien created thereby. This did not constitute duress.

The facts of this case bring it clearly within the principle announced in *Hawthorne, Trustee in Bankruptcy, v. Hendrie & Bolthoff Mfg. & Sup. Co.*, 50

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Colo. 342; *Burns v. Natl. M., T. & L. Co.*, 47. Colo. 557; *Knowles v. Harrington*, 45 Colo. 346; *Floyd v. Cochran*, 24 Colo. 489, and *Atkinson v. Tabor*, 7 Colo. 195, 197.

The plea in abatement is, therefore, sustained, and the writ of error dismissed.

Writ dismissed.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 7181.]

SALAS V. THE PEOPLE.

1. EVIDENCE—*Res Gestae*—One offering a statement made out of court, as part of an act or transaction must establish the preliminaries necessary to show that it is in fact part of such transaction—(463).

One indicted for murder offers to prove a statement touching the affray, made by the deceased some hours after he had received the wound of which he died. There was no evidence of what had transpired during this interval. The statement was *held* narrative merely, and not *res gestae*—(464).

2. DYING DECLARATIONS—*Contradictory Statements of Deceased*—Declarations of the deceased made after he had received the fatal wound, are admissible to impeach his dying declarations. The impossibility of calling his attention to the former statement attributed to him renders the case an exception to the general rule requiring this—(465).

Error to Bent District Court—Hon. HENRY HUNTER, Judge.

Mr. H. L. LUBERS and Mr. C. E. SNYDER for plaintiff in error.

Hon. JOHN T. BARNETT, attorney general, Hon. BENJAMIN GRIFFITH, attorney general. Mr. JAMES M. BRINSON, deputy attorney general, and Mr. THEODORE

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M. STUART, Jr., assistant attorney general, for the people.

Mr. JUSTICE GARRIGUES delivered the opinion of the court.

1. Plaintiff in error, Florencio Salas, was convicted of murder of the first degree for shooting and killing Domingo Balles, and sentenced to life imprisonment in the penitentiary. People's evidence shows, that on July 24, 1909, deceased was floor manager at a dance in Las Animas; shortly before midnight, Jayo, brother of the defendant, was very abusive and quarrelsome, and started to pick a fight with one Pedro, outside the dance hall; deceased tried quietly to get him to go home, and in so doing, placed his hand on Jayo's shoulder; defendant said: "No son of a bitch can take my brother," and immediately fired, striking deceased in the abdomen; deceased grabbed the gun; in the struggle which ensued, defendant was overpowered by the assistance of others and the pistol taken from him; deceased went back into the hall, where he received medical attention, and stayed there until the next morning, when he was taken home, and died about four o'clock on the afternoon of the 25th.

Defendant's evidence showed that he was a musician playing for the dance, and going out during the disturbance, found his brother intoxicated, and in a quarrel or fight with Pedro; at deceased's request, he intended to take his brother home; but went back in the hall first, to get a pistol he had secreted there early in the evening; this he put on the inside of his trousers, and while standing by deceased and his brother, deceased put his hand on Jayo's shoulder and asked him to go home; about this time the pistol slipped down the inside of the leg of his trousers, and was coming out at the bottom; he reached down and pulled it out, when deceased grabbed it, and in the

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struggle which ensued over its possession, it was accidentally discharged, killing deceased; but that he did not know who did it; in any event, the shot was unintentional.

The People introduced without objection, the dying statement of deceased, in which he said that Jayo and Pedro were fighting outside; that he went out and tried to quiet Jayo, when the defendant said he had something for any son of a bitch what wanted to take his brother, and immediately drew his revolver and shot him; that a scuffle followed over the possession of the weapon.

Defendant offered to prove by witness Taylor, that on the morning of the 25th, witness had a conversation with deceased in the dance hall before he was taken home, in which he said, in the presence of two other witnesses, that Florencio Salas shot him; that there were three or four persons scuffling for the pistol and during the scuffle, it went off, and he was shot. The people objected to this offer on the ground that it was hearsay. The objection was sustained, and to the ruling error is assigned.

Defendant claims the offered testimony was admissible upon two grounds: First, as a part of the *res gestae* of the litigated fact; second, that it was a statement made out of court by the deceased, inconsistent with his dying declaration, and tended to impeach him.

2. The record fails to show the time, also the events transpiring during the interval between the fatal shot and the alleged statement. While these do not determine the competency of a statement made out of court, offered as a part of the *res gestae*, still they should be shown, before the statement is admitted. One offering an oral statement made out of court, as a part of the *res gestae* of a litigated fact, must first prove the things necessary to qualify the statement

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as evidence; until this is done, it is hearsay and not *res gestae.* The statement itself is no proof that it is a part of the *res gestae.*—*State v. Williams,* 108 La. 222; *Bradberry v. State,* 22 Tex. App. 273; *Ford v. State,* 40 Tex. Crim. 280; *Pool v. Warren County,* 123 Ga. 205; *State v. Pugh,* 16 Mont. 345; *Territory v. Armijo,* 7 N. Mex. 436; *Vickery v. State,* 50 Fla. 149.

3. Instinctive, voluntary, spontaneous words, said under the impulse of an event of which they form a part, are not hearsay. They are incident to or a part of the transaction litigated, and admissible in evidence as a part of the *res gestae;* that is, as a part of all the circumstances making up the whole case. In the case at bar, the offered testimony is but a narrative of what had occurred. It and the fatal shooting are distinct, with no connection between them, and the statement is not an incident of the transaction. The court did not err in excluding the statement as a part of the *res gestae.*—*Graves v. People,* 18 Colo. 170; *Herren v. People,* 28 Colo. 23; *Pueblo Building Co. v. Klein,* 5 Colo. App. 348.

4. The people's evidence, without the dying declaration, showed that when deceased put his hand quietly on Jayo's shoulder and tried to get him to go home, defendant shot him in the abdomen; that deceased grabbed the gun after he was shot, and there was a struggle over the weapon. Deceased's dying declaration is, that when he placed his hand on Jayo's shoulder, defendant, with an ugly remark, instantly shot him, and that the scuffle for the possession of the weapon was after the shooting. Defendant testified, that when he took the pistol from the bottom of his trousers leg, the deceased grabbed it, and during the struggle, it was unintentionally discharged, striking the deceased. There is a sharp conflict in the evidence, whether deceased was shot before the struggle

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over the gun, or whether it was unintentionally discharged by someone during the struggle. The offered testimony was, that the deceased, in the dance hall, after the shooting, before he was taken home, and before his dying declaration, in a conversation with witness Taylor, said that there were three or four persons scuffling for the possession of the revolver, and during the scuffle, it went off and shot him. This offered testimony is in conflict with, and tends to impeach the dying declaration of the deceased. The district attorney objected to it upon the ground that it was hearsay, and that the proper foundation had not been laid, and the objection was sustained. In this ruling, the majority of the court are of the opinion that the district court committed reversible error. It was competent for the defendant to introduce evidence tending to show that the deceased had made statements out of court, after he received the mortal wound, inconsistent with his dying declaration. That a dying declaration may be impeached, by showing that the person making it has made other statements inconsistent therewith, is held by the great weight of authority.—*M'Pherson v. State*, 9 Yerg. 279; *People v. Lawrence*, 21 Cal. 368; *Carver v. U. S.*, 164 U. S. 694; *State v. Blackburn*, 80 N. C. 474; *Battle v. State*, 74 Ga. 101; *Morelock v. State*, 90 Tenn. 528: *Green v. State*, 154 Ind. 655; *State v. Mayo*, 42 Wash. 540; *Hurd v. People*, 25 Mich. 405; *State v. Shaffer*, 23 Ore. 555; *Commonwealth v. Silcox*, 161 Pa. St. 484; *McCorquodale v. State*, 54 Tex. Crim. 344; *Dunn v. People*, 172 Ill. 582; Wigmore on Evidence, secs. 1033, 1446.

Such is the opinion of this court upon the admissibility of oral statements made out of court by a deceased person, contradicting or impeaching a dying declaration.

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The writer of this opinion, however, does not agree with the opinion of the court on this point, and I will now give my reasons for dissenting.

5. The law is thoroughly established, that evidence cannot be introduced showing that a witness at some other time, when not under oath, made statements out of court inconsistent with his testimony, without first laying the foundation by calling the witness' attention, when on the stand, to the time and place, and circumstances surrounding the making of the alleged statements, and affording an opportunity to contradict or explain the statements on re-examination of the witness. Such evidence is purely hearsay. Its admission is an exception to the general rule excluding hearsay evidence, and before it can be admitted under the exception, the proper foundation, above stated, must be laid.—*Nutter v. O'Donnell*, 6 Colo. 253; *Rose v. Otis*, 18 Colo. 59; *Ryan v. People*, 21 Colo. 119; *Mullen v. McKim*, 22 Colo. 468; *Teller v. Ferguson*, 24 Colo. 432; *Jaynes v. People*, 44 Colo. 535; *Insurance Co. v. Wich*, 8 Colo. App. 409.

The majority opinion does not dispute this principle, but holds, in a dying declaration, there is an exception to it, because death has made it impossible to lay the foundation. I think the law, as well as substantial justice, does not, and should not recognize such an exception; in other words, there is no such exception recognized by the best line of adjudicated cases. The death of the witness does not dispense with the general rule in such cases requiring the foundation to be properly laid.—*Mattox v. U. S.*, 156 U. S. 237; *Ryan v. People*, 21 Colo. 119; *Stacy v. Graham*, 14 N. Y. 492; *Runyan v. Price*, 15 O. St. 1; *Wroe v. State*, 20 O. St. 460; *State v. Taylor*, 56 S. C. 360; *Craft v. Commonwealth*, 81 Ky. 250.

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It necessarily follows, if there is no such exception, that such statements, not made under oath, *or in xetremis,* are purely hearsay, and not admissible to impeach a dying declaration.

In the *Mattox case,* 156 U. S. 237, defendant was convicted of murder. On the first trial, a witness by the name of Whitman, testified for the government, claiming to be an eye witness to the shooting. At the second trial, he having died in the meantime, a transcribed copy of the stenographic notes of his testimony, was read by the government to the jury. For the purpose of impeaching this evidence, defendant offered to show, that after the first trial Whitman said his testimony was false; that he did not witness the shooting; and told why he testified falsely. The district attorney objected to this offered testimony because the proper foundation had not been laid, and an opportunity to explain or contradict it had been cut off by the death of Whitman. The objection was sustained and error assigned thereon. After the case had been submitted, counsel were allowed to file further briefs upon the question of the admissibility of this offered evidence, and the case was re-submitted to the full bench. It was insisted that the rule did not apply, because Whitman was dead and the alleged contradictory statements were made subsequent to the giving of his testimony at the first trial, and consequently no foundation could be laid. The court held that the authorities recognized no such distinction or exception. The case decides that the fact that a witness cannot be produced, because he is dead, does not dispense with the necessity of laying the proper foundation before his evidence can be impeached. The opinion of the court is summed up in this forceful language:

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"While the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible. If it were generally understood that the death of a witness opened the door to the opposite party to prove that he had made statements conflicting with his testimony, the history of criminal trials leads one to believe that witnesses would be forthcoming with painful frequency to make the desired proof. The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be to him. There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it. The respective advantages and disadvantages of a relaxation of the rule are so problematical that courts have, with great uniformity, refused to recognize the exception."

In the *Ryan case*, 21 Colo. 119, the people took and read to the jury the deposition of a witness named Dulin. Defendant offered to show that Dulin, since it was taken, made statements out of court contradicting his deposition. The offer was rejected upon the ground that the proper foundation had not been laid. Defendant claimed it was impossible to lay the foundation because the statement was made after the deposition was taken. We then said that the law recognized no such exception, and that the courts with great unanimity declared that a witness could not be so impeached, without first laying the foundation. I

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quote from the opinion to show that we were then in full harmony with the *Mattox case:*

"The opinion in *Mattox v. United States, supra,* contains an able and exhaustive review of the authorities upon the question. The exception there and here claimed was held to have been rightfully denied in that case, although the defendant was upon trial for a capital offense, which trial resulted in his conviction and sentence. We fully concur with the reasoning of the majority of the court in that case, and hold in this case that the evidence of the witnesses Coryell and Masterson, sought to be introduced for the purpose of showing that the witness Dulin had made statements out of court contradicting or differing from his deposition, was properly rejected, as no foundation had been laid for the introduction of such evidence."—*Ryan v. People,* 21 Colo. 126.

It is difficult to reconcile the *Mattox case* with *Carver v. U. S.,* 164 U. S. 694. The only attempt of the court to do so is by the statement:

"That case (*Mattox case*), however, was put upon the ground that the witness had once been examined and cross-examined upon a former trial."

In the *Mattox case,* it should be remembered, Whitman was dead when his evidence was read at the second trial. The alleged statements were made after the first trial. He could not have been cross-examined upon them at the first trial, because they had not been made then. If the court in the *Carver case* had explained how the defendant in the *Mattox case,* could by cross-examination of the witness Whitman on the first trial, lay the foundation for impeaching him on account of contradictory statements by him after the first trial, I might understand how to distinguish the two cases. On the point involved, I think the two cases are practically the same, and cannot be distinguished in principle. We have gone on record in the

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Ryan case, upholding the doctrine announced in the *Mattox case,* and I do not think we should change the law there announced. I think the language of the supreme court of South Carolina very appropriate:

"Counsel for appellant has cited the case of *Carver v. United States,* 164 U. S. 694, in support of his contention that the testimony in question was competent for the purpose of contradicting and impeaching the statements made by the deceased in her dying declarations, and that case does so hold. But it seems to us, in principle, the case is irreconcilable with the previous case of *Mattox v. United States,* 156 U. S. 237, which, while not a case of an attempt to impeach dying declarations, the whole subject was fully and elaborately considered—much more so than in the case of Carver. In both of these cases the court was divided, and we are not prepared to accept either as binding authority upon us, in a case of this character, where no federal question is involved. On the contrary, it seems to us that the conclusion reached by the Ohio court, in *Wroe v. State, supra,* is more in accordance with reason than the contrary conclusion. To hold that it is competent to impeach the dying declarations of a deceased person by testimony tending to show that she had made statements in conflict with those contained in her dying declarations, not under the sanction of an oath nor under the shadow of impending death, would tend not only to afford a strong temptation to the fabrication of false testimony to save the life of the accused, when death had rendered it impossible to rebut or explain such statements, but would also tend to absolutely destroy the efficiency of dying declarations as evidence. We do not think, therefore, that such testimony is competent."—*State v. Taylor,* 56 S. C. 368.

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The offered testimony is not a dying declaration, nor a part of the *res gestae*. It is a dangerous kind of hearsay, and its admission, when the proper foundation has been laid, is an exception to the rule regarding hearsay evidence. The death of the witness does not create an exception to the exception. To admit it, without a proper foundation, on account of the death of the witness, would deprive the people of the opportunity to deny or explain, without any equivalent for the loss sustained. An exception to a general rule should never be created where it would simply shift the hardship from one party to another. If established, an impeaching witness could, with impunity, swear to any statement whatever, without fear of contradiction. Those with long practical experience in criminal trials, know that to recognize such an exception, will invite corruption, fraud, perjury and subornation of perjury in our courts. The cases cited sustaining the doctrine, present a striking example of the growth of an erroneous principle from the misconception or misapplication of some early case. The two cases universally quoted as foundational cases, are *M'Pherson v. State*, 9 Yerg. (Tenn.) 279, and *People v. Lawrence*, 21 Cal. 369. Every case and text I have been able to examine, sustaining this doctrine, is either based on these two cases, or on other cases based on them. I think it can be shown that these two cases are no authority for the doctrine, and that the decisions purporting to rest thereon, have misconstrued or misapplied them and are founded on a false basis.

In *Murdock v. State*, 90 Tenn. 529, the supreme court of that state, speaking of the *M'Pherson case* in 9 Yerg. says:

"But in that case, all the statements were made *in extremis*, and were clearly admissible as dying

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declarations." The case turned wholly on conflicting statements in the dying declaration itself. The point under consideration in the case at bar, did not enter into that case in any way, and it is no authority for the contention.

In the *Lawrence case*, 21 Cal. 368, is the following statement of fact:

"After the evidence for the prosecution had closed, the defendant offered to prove that the deceased, after the shooting and at the primary examination of the defendant before the committing magistrate, swore to facts directly contradicting his dying declarations. The court refused to admit the evidence, and the defendant excepted."

It appears in this case, that after the shooting, probably before it was anticipated that the deceased would die from his wounds, there was a preliminary examination of the defendant at which the prosecuting witness was sworn and testified. He died sometime after this, and made a dying declaration regarding the shooting, which was admitted in evidence against the defendant on his final trial for murder. There was a material conflict between his dying declaration, and his sworn evidence at the preliminary, and this evidence was offered for the purpose of impeaching his dying declaration. Under the circumstances of that case, his evidence at the preliminary was competent evidence at the final trial. It is universally held where a witness has been duly sworn and examined in court and an opportunity offered for cross-examination, that upon a subsequent trial of the same transaction between the same parties, if the witness is beyond the jurisdiction of the court and cannot be produced, that his evidence at the former trial may be read to the jury. Either party may use it. Not only this, the alleged contradictory state-

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ments were evidence given under oath, in a court proceeding between the same parties with all the right and opportunity of cross-examination. The case is no authority for allowing one, after the opportunity for contradiction or explanation had been cut off by death, to come into court and testify to an alleged oral conversation had with a deceased witness out of court for the purpose of impeaching his evidence. I do not think that purported oral hearsay statements made out of court, not made under oath and not *in extremis* should be admitted for the purpose of impeaching a dying declaration.

Reversed and remanded for a new trial.

Reversed.

Decision *en banc.*

Mr. JUSTICE GARRIGUES dissents.

CHIEF JUSTICE CAMPBELL not participating.

[No. 5808.]

GUMAER ET AL V. BELL.

1. DEFAULT—*Excusable Neglect.*—The provisions of the code for the vacation of judgments by default are to be liberally construed. The design of the statute is to call into exercise the equitable powers of the court. An action was instituted in El Paso County against husband and wife, upon certain joint promissory notes. Service was made upon both defendants by delivery to the wife of a copy of the summons and complaint, at the joint residence in Fremont County. The answer was due on the 17th of August. The wife had no knowledge of the various transactions of which the promissory notes were a part, nor of what defense might be made to the action. The husband was then absent in the City of New York but his return was expected on or about the 10th of August. After this date the wife was informed that he would not return for a considerable time, and on the 13th she transmitted the papers to him, informing him of the service. The husband upon receiving the copy mailed them by special delivery letter to his attorney in Denver, instructing him

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to enter an appearance. The attorney failed to receive the papers until late in the afternoon of the 19th. A default was entered on the 18th, and on the 25th of August final judgment against both defendants for over Eleven Thousand Dollars. The husband upon being informed of the situation immediately returned to Colorado and an application by both defendants, to vacate the default and for leave to answer, was promptly interposed, supported by affidavits showing the facts, and exhibiting a meritorious defense. *Held* that in view of the manner of the service, the husband's absence, the short delay in defendant's appearance and that plaintiff was not prejudiced by it the neglect was excused as to the husband—(475-479).

As to the wife it was held that in view of her inexperience in business, her ignorance of the defense, that she relied upon her husband in all business matters, that at the time of receiving the summons and complaint she justly expected her husband's speedy return, that her conduct was not different from what might be expected from any wife similarly situated, and considering also the large amount of the judgment, her default also was to be attributed to excusable neglect and vacated—(479, 480).

2. ——*Discretion of the Court.*—The discretion of the court in determining an application to vacate a default is not a capricious or abitrary discretion, but is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of justice—(486, 487).

Whenever the court of review, upon examination of the facts, is convinced that the action of the court below, in such case, was not in conformity with the spirit of the law its single duty is to vacate the erroneous judgment—(487).

3. ——*Meritorious Defense*—To vacate a default a mere showing of excusable neglect is not sufficient.

A defense to the action *prima facie* meritorious, must also appear.

And it must be stated with such fullness and particularity that the court can see that it is substantial, not technical, meritorious and not frivolous—(480).

A defense to part of the cause of action is sufficient—(480).

If it is made to appear that in justice to the defendant he is entitled to be heard this suffices. The case made held to be sufficient.

4. ——*Conditions*—A judgment by default being reversed the cause was remanded with directions to the lower court to

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allow an answer to be filed within a reasonable time to be fixed by that court, and upon payment by defendants of all costs which had accrued in that court, to the day upon which the defendant's motion to vacate the judgment had been denied in that court.

Error to El Paso District Court—Hon. ROBERT E. LEWIS, Judge.

Messrs. RICHARDSON & HAWKINS for plaintiffs in error.

Messrs. LUNT, BROOKS & WILCOX for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

On July 12, 1905, an action was commenced by the defendant in error as plaintiff against the plaintiffs in error as defendants, in the district court of El Paso county, upon two promissory notes, each dated October 18, 1894, the one for the sum of $4,800, the other for the sum of $2,500, payable respectively in fifteen months and one year after date, with interest at six per cent per annum.

On July 18, 1905, summons in said action was served upon the defendant, A. R. Gumaer, by leaving a copy of the summons and complaint in the action at his usual place of abode in Fremont county with a member of his family residing with him over the age of fifteen years, to-wit, his wife, the defendant, E. L. Gumaer, and, at the same time, service was made on the wife. The defendants had until and including the whole of the 17th day of August, at least, in which to appear in the said action. No appearance having been made by these defendants, default was entered against them on the 18th day of August. On the 21st day of August, the 20th being Sunday, the defendants filed a

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motion for change of venue to Fremont county, on the ground that the plaintiff was a resident of the state of New York, and the defendants were residents of Fremont county, in which county service was made upon them, and the notes were payable in the state of New York, as appeared from the complaint. This motion was supported by affidavit as well as by the sheriff's return and complaint. On the 25th day of August, the court, on motion of plaintiff, without any notice to the defendants, struck the motion for change of venue from the files, and, on the same day, entered judgment against the defendants in the sum of $11,545.00. In due time, the defendants filed a motion to set aside the judgment and default, and, in support of this motion, the following facts appeared from affidavits filed in support thereof:

The defendant, A. R. Gumaer, at the time of the service of said summons, was, and for some time prior thereto had been, absent from the State of Colorado and in the State of New York. He expected to return home about August 10th from New York and so informed his wife, and for that reason she retained the summons and complaint, intending to deliver them upon her husband's return. He did not return on the 10th day of August, as expected, and afterwards his wife learned that he did not expect to return for some time, and on the 13th day of August she mailed the summons and complaint to her husband in New York, informing him that they had been delivered to her. Upon their receipt, he immediately mailed them, by special delivery letter, to his attorney in Denver, instructing him to at once enter an appearance in the case. The attorney received the letter with the papers about five o'clock p. m. on Saturday, August 19th, and immediately called by telephone for the district clerk, and the attorney for plaintiff at Colorado Springs, but could not reach either of them. The attorney, being unable to

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reach the parties at Colorado Springs, mailed the motion for change of venue to the clerk of the district court at Colorado Springs on Saturday, August 19th, to be filed, and, at the same time, a copy thereof to plaintiff's attorney. On Monday, August 21st, the clerk called up the attorney at Denver and informed him that a default had been entered in the case, but no judgment. Thereafter, some correspondence took place between the respective attorneys. A. R. Gumaer had always acted for and as the agent of his wife in all business matters, and she had no knowledge of the defendant's defense to the action, or the subject matter thereof. She was without business experience and waited for her husband's return, expecting that he would take charge of the litigation. An affidavit of the defendants stated that they had a good and valid defense to the complaint; that they were in no way indebted to the plaintiff; that a small payment endorsed on said notes, as of July 18, 1899, had been made to the original holder; that they had come to the hands of the plaintiff and his immediate predecessor in title from the original holder many years after they became due, subject to offsets and counterclaims, in favor of the defendants, and set up in detail a long statement of their alleged defenses, offsets and counterclaims to the said notes, arising out of numerous transactions with the original holder through many years. The affidavit of merits was supplemented by the affidavit of the defendant's attorney, stating that, from the statements made to him by Mr. Gumaer, he believed that the defendants had a good and valid defense and that there should be an accounting between the parties. The motion to vacate the judgment and default was denied by the court on September 14, 1905, and to review the judgment and the action of the court in denying the motion, the defendants have brought the case here on error. The effect of the filing of the motion for

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change of venue, after the default and before the entry of judgment, will not be considered, because defendants asked to be permitted to answer.

Section 81, Rev. Code, provides for the allowance, in furtherance of justice, of amendments, enlargement of time to plead, correction of mistakes, etc., and that the court may, upon such terms as may be just, and upon payment of costs relieve a party from a judgment, order or other proceeding taken against him through mistake, inadvertence, surprise or excusable neglect.

The defendants were duly served with summons in the action, and it was neglect on their part, under the circumstances, if they failed to respond thereto within the time required by law. The first actual knowledge, appearing in the record, that the defendant, A. R. Gumaer, had of the service of the papers was after August 13th, such a length of time after that date as was required for the papers to reach him by mail from Florence, Colorado to New York. On this point, the affidavit is not specific enough to satisfy plaintiff, but without being unduly critical and technical and ascribing to defendants' bad faith and an effort to deceive the court, no other conclusion can be fairly drawn from it, for on the whole it appears to be a narration of what Mrs. Gumaer did with reference to the matter after receiving the papers. The plaintiff took his default on the 18th, the first day that he could do so. To have saved it, the motion for a change of venue ought to have been filed on August 17th. The time intervening between his receipt of the papers and the last day for appearance was to be computed in hours, and he was away—the distance from Colorado to New York. In his affidavit, he says that when he received the papers he made a mistake in computing the time in which he had to appear in the action, and thought that the papers would reach the attorney by mail in time for an appearance, though he does not state how

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or in what manner he made the mistake. The fact that Gumaer knew the notes were in an attorney's hands for collection about three months before the action was brought can have no bearing in showing the quality of the neglect after the action was commenced and process served. Whatever neglect there was on the part of A. R. Gumaer, prior to the time that he received the papers, so far as this record shows, was but constructive neglect, if such a term be permitted, or imputed neglect, if the negligence of his wife can be imputed to him. As soon as he received the papers he evinced at once a desire to defend the action. After the default, in response to the notice of his attorney, he came home quickly, put the attorney in possession of the facts, and his defense, and had the motion to set aside the default and judgment made and promptly filed and heard. If, on the whole showing as made, in view of the manner of service, Gumaer's absence from the state, the very short time that the appearance of defendants was delayed, the fact that plaintiff was not disadvantaged thereby, his neglect was not excusable within the spirit of our code, as hereafter shown, then excusable neglect cannot be recognized.

The wife, E. L. Gumaer, is shown to have been without business experience. Her husband was her agent in the conduct of her business, and she relied and depended on him. He had carried on the transactions concerning these old notes and the transactions out of which arose the alleged defense thereto, and she had no knowledge of them. She expected, and it is shown, that she had a right to expect that her husband would return by the 10th of August, in ample time to appear in the action and make defense. When he did not come, and learning that he would not return for some time, inexperienced in business and accustomed to rely on her husband, she did what such a woman was likely to do—sent the papers to him for attention, informing

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him that they had been delivered to her. Her neglect, such as it was, was unintentional, and apparently ignorantly done, and committed, no doubt, in endeavoring to do what she thought was best to do. This record does not disclose but that her negligence was the result of the best impressions of an inexperienced woman, accustomed to rely on her husband. Under such circumstances, the degree of negligence in the wife can not be measured as though she were a stranger dependent on herself. Her conduct brought ill only to herself and her husband. Her husband was excusable. Both have shown merit. If he is let in to defend and his wife not, the result may be a judgment in his favor, or a greatly reduced one against him. Then would the present judgment against the wife stand only as a penalty against her for unintentionally managing the matter so that she failed by two or three days in getting in an appearance. Eleven thousand dollars is too great a penalty for such a slight offense, when under the code reasonable terms could have been imposed, and the possibility that such an injustice may be worked out is enough to excuse this woman and to let her in with her husband to defend.

But the authorities hold that it is not sufficient to show that the neglect, which brought about the default, is excusable. The defendant must also show a meritorious defense to the action. It is sufficient to show that the defense is *prima facie* meritorious, and must be stated so that the court will be enabled to see that it is not frivolous. Where a meritorious defense is shown to part of plaintiff's cause of action it is sufficient. 6 Ency. Pl. and Pr., 185-188. It is said that when a sworn answer is filed it will be accepted as a sufficient affidavit of merits and it will be examined by the court only to determine whether it is frivolous and not to ascertain whether it will prevail if established on a new trial, unless it is apparent that it can-

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not possibly prevail. *ib.* 188. In line with these expressions, our court of appeals, on the question of showing merits said:

"There must be sufficient showing to the court to demonstrate the possibility, at least, that if the judgment was vacated and a new trial had, the result would be different." *Donald v. Bradt*, 15 Colo. App. 414 at 416.

From this it is seen that if the showing is of a defense that is substantial, not technical; meritorious, not frivolous; and that may change the result upon trial, it is sufficient. We cannot pause to analyze, in this opinion, the long affidavit filed, nor try the case in advance. The showing demonstrates the possibility, at least, that on the trial the result will be different and is substantial and meritorious in the sense that such a showing is required to be. The notes sued on in this case were each due more than nine years before the commencement of the action. They came into the hands of the plaintiff's father from the original holder several years after they became due, and the showing is, that many transactions took place between the original holder and the defendants before the notes were transferred, giving rise, it is claimed, to liabilities chargeable against the notes. Money was paid out by the defendant, A. R. Gumaer, for the use of the original holder at his request, it is said. Collateral of value, belonging to the said defendant and securing the notes, is alleged to have been converted by the plaintiff to his own use, all of which clearly demonstrates that in justice and fairness the defendants ought to have had an opportunity to be heard and submit their claims against the old notes to the court for adjudication. The views herein expressed with regard to this case are in harmony and are supported by the spirit of our code and the intendments of section 81.

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Section 478, Rev. Code, says, that the provisions of the code and all proceedings under it should be liberally construed to assist the parties in obtaining justice. In 6 Ency. of Pl. and Pr., 154, it is said, that "a statue providing for the opening or vacation of a judgment by default is remedial and should be liberally construed by the courts, especially in those cases where such a construction is calculated to advance justice."

Section 81 of our code is practically the same as what was formerly the 68th section of the Practice Act of California, and the portion thereof relating to a relief from a judgment or order on account of inadvertence, surprise or excusable neglect is precisely the same in both. Speaking of this section, the court said in *Roland v. Kreyenhagen,* 18 Cal., 455:

"The power of the court should be freely and liberally exercised under this and other sections of the act to mould and direct its proceedings, so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. * * * It can also usually prevent unjust or unfair advantages, or serious injury arising from casualties or inadvertence. The design of the act was to call into requisition its equitable powers in this respect."

And in *Watson v. S. F. & H. B. R. R. Co.,* 41 Cal. 17, speaking of applications for relief against default judgments, it is said that:

"Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a gen-

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eral rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

Viewing the present case in the light of these authorities and intendments of the code, what is there to show that justice was done by not setting aside this judgment and permitting the defendants to put in their defense and the case to be heard on its substantial merits? While the defendants were guilty of neglect, yet, in the light of all the circumstances of the case, it can truly be said to be excusable. They have shown sufficient merit as has been seen. It has not been pointed out, nor can it be perceived, that any injustice would have been wrought to plaintiff had the judgment been set aside on September 14th. True, if the defendants had been let in and the case tried in September, he may not have obtained as large a judgment as he had obtained by default a few days before, in August, or he may have been defeated altogether. For plaintiff to have lost out on a fair trial is not an injustice. If error would have been committed against him he had the right to have it corrected on review. The truth is, his position was in no manner prejudiced by the short delay of defendants—indeed it could not be. He was just as able to prove his case on September 14th as he had been on August 25th. If his cause was just he no doubt would have prevailed. If his cause was unjust he ought not to have prevailed. On the

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other hand, great injustice may have been done defendants by denying this motion. It is possible that the defendants would have prevailed, or they may have succeeded in materially lessening the judgment against them. If they could have done so, then the refusal to vacate worked a positive injustice to them and this judgment for over $11,000 stands as a penalty against them for having failed by two or three days to put in an appearance, for which failure they were excusable. This is not assisting the parties in obtaining justice, nor is it calculated to advance justice. Under section 81, the court could have set aside the default upon resonable terms, more or less severe, by which the defendants would have been sufficiently penalized, if a penalty was proper. After this review of the facts and circumstances of this case, there remains no reason why it ought not to have been heard on its substantial merits. The contentions and arguments of the plaintiff savor of harshness out of harmony with the spirit of the law, as shown by the above authorities. He insists that the court should protect his rights. There is no question about that. Courts, however, are as much bound to protect the rights of the defendants as those of the plaintiff. After all, viewed in the light of a remedial statute, the right of the plaintiff is a technical one. It partakes more of the nature of an advantage than of a substantial right. He took the default subject to being set aside under section 81 of the code. He obtained his judgment after the defendants had filed a motion in the case—a motion that probably would have ousted the court of jurisdiction had it been filed before default—and we do not decide what effect it had when filed afterwards. This motion, at least, apprised the court and plaintiff that the defendants were on hand ready to contest the action, after a delay of not to exceed three days, and it was deemed necessary to strike it from the files without notice to

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the defendants, in order to take judgment against them. It may be that the plaintiff was within his strictly technical rights. Such rights should have due and weighty consideration at all times, and in proper cases preserved. But it must be remembered that plaintiff secured the rights he did, knowing them to be and under circumstances that made them subject to judicial scrutiny, bringing in view all the circumstances of the whole case, illuminated by the remedial provisions of section 81 and liable to be taken away by that section, in the application of which, as said by the Supreme Court of California, the equitable powers of a court are called into requisition, and technicalities are regarded as "obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial rights."

The authorities cited by plaintiff have been examined. In none of them are the facts as in this case, nor do the delinquent parties appear so excusable, nor does it so plainly appear that no damage or injustice would have inured to the plaintiff and that injustice might have inured to the defendant. It is true that these authorities announce the rule to be that a motion to vacate and set aside a default and judgment thereon is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that the discretion was abused. The rule was announced in *Bannerot v. McClure*, 39 Colo. 472. There, however, default was not entered until more than sixteen months after service, and the motion to set aside was not made until nearly eight months after the default was entered, and the court said that the affidavit, filed in support of the action, utterly failed to show any excuse for the neglect, and that no attempt was made to show a meritorious defense. The rule was announced in *Morrell Hdw. Co. v. Princess G. M. Co.*, 18 Colo. App. 54. In that case, the com-

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plaint was against the court for setting aside the default and judgment. The affidavit in support of the motion was not satisfactory, but the showing of merits was clear, and the court of appeals said it could not say that the lower court abused its discretion in setting aside the judgment and default. The rule was announced in *Donald v. Bradt, supra*; but in that case the motion was not made until nearly six months after judgment, and the court thought that that was an important factor to consider; besides, the court was clear that the showing of merits was insufficient on its face.

In *Elliott v. Quinn,* 40 Colo. 329, this court held that the default ought to have been set aside, and reversed the judgment because it had not been, yet in that case the matter rested in the sound discretion of the court as much as in the case at bar. So in *State Board of Agriculture v. Meyers,* 13 Colo. App. 500. In some of the authorities cited from other states there was a conflict in affidavits as to the degree of negligence, and the court announced the rule under such circumstances. The nearest approach to the facts in this case is in *Jordan v. Hutchinson,* 39 Wash. 373. There, the appellants actually knew of and wrote a letter about the case to an attorney in Seattle thirteen days before the default was entered. Besides, it appears from that case that the code of Washington did not provide for excusable neglect, but provided that the court may, in its discretion, set aside any default upon affidavit, showing good and sufficient cause. The court said the record showed no more than neglect without reference to whether it was excusable or not, and for that reason no sufficient cause was shown. Under our code, excusable neglect is a sufficient cause, and had the code of Washington been the same, the decision might have been different. The discretion intended by the rule "is not a capricious or arbitrary one, but is an impartial discretion, guided and con-

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trolled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." *Bailey v. Taafe*, 29 Cal. 424.

Appellate courts are not precluded by the rule from reviewing the exercise of discretion and in proper case correcting it. Each case must be determined upon its own facts, for no two cases are alike, and all the facts and circumstances of each case must be scrutinized. When a court of review, upon an examination of these facts, becomes convinced that the exercise of discretion by the lower court, in a particular case, is not in conformity with the spirit of the law and has not been properly exercised, there is but one duty to perform and that is, to correct the error and send the case back for trial. The reversal of this judgment is well within the rule announced by the authorities.

The former opinion is withdrawn and this opinion filed in lieu thereof, but the conclusion heretofore reached will be adhered to, and that is, that the judgment of the district court is reversed and the cause remanded, with instructions that upon payment by the defendants, within thirty days, of all the costs that had accrued in the action, to and including the 14th day of September, 1905, the judgment and default in the district court be set aside and these defendants given leave to file their answer to the complaint in the action, as they asked in their motion to vacate, within such reasonable time as may be fixed by the court. The motion for rehearing is denied.

Reversed and Remanded.

Motion for rehearing denied.

Decision *en banc*.

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Mr. JUSTICE GABBERT and Mr. JUSTICE GARRIGUES dissent.

CHIEF JUSTICE CAMPBELL not participating.

Mr. JUSTICE GABBERT dissenting:

A motion to set aside a default is addressed to the sound discretion of the trial court, and its judgment thereon will not be disturbed unless it clearly appears that there was an abuse of such discretion. *Bannerot v. McClure,* 39 Colo. 472; *Morrell Hdw. Co. v. Princess G. M. Co.,* 16 Colo. App. 54.

Tested by this rule, which is universal, not only in this, but in every other jurisdiction, it is manifest the judgment of the district court, refusing to set aside the default, should not be disturbed.

The note sued upon had been in the hands of counsel for plaintiff several months before suit was brought. It appears from the record that through correspondence between counsel now representing the respective parties, Mr. Gumaer had conferred with his present counsel regarding these identical notes something like four months before action was brought against him. In the affidavit filed in support of the motion to set aside the default, Mrs. Gumaer says that she expected her husband to return to their home at Florence, in this state, about August 10th, or only seven days before the time for entering an appearance would expire; that he did not return, as expected, and two or three days later, namely, on the 13th of August, having learned that he would not return for some time, she mailed the papers to him in the City of New York, or only four days before the time when the process served required an appearance to be made. What steps she took, or how she ascertained when he would return is not stated. But four days remained after she started the papers to New York from Florence, in this

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state. She must be presumed to have known when an appearance was necessary. She does not state she did not. What excuse does she offer for not communicating with her husband regarding the matter in a manner which would have advised him that suit had been commenced, and enabled him to have communicated with counsel in ample time to have prevented a default? On this subject the record is entirely silent. Parties desirous to be relieved on the ground of excusable neglect must show diligence. She has failed to make such a showing. Mr. Gumaer knew of these notes; knew that they were in the hands of attorneys for collection; had employed counsel to represent him; and a brief message by wire from his wife would have sufficiently advised him of the situation, so that he could, by the exercise of reasonable diligence, have taken steps to prevent a default. But the failure to exercise diligence does not stop with the neglect of Mrs. Gumaer. When the papers reached her husband in New York, after being mailed to him from Florence on the 13th of August, common knowledge with respect to the distance between the two points and the time it requires for mail to go from one point to the other warrants the assumption that but little time would remain for entering an appearance after he received the papers by mail, and which, from his own statement, or at least, from the results that followed, did not leave him sufficient time to communicate with his attorneys by mail, and yet, he mailed the papers to them in the city of Denver; but they did not reach their destination until August 19th. What date Mr. Gumaer received the papers he does not state, but contents himself with the statement that he thought they would reach Denver in time. What excuse does he offer for pursuing this course? Why did he not wire his attorneys, with whom, months before, he had conferred regarding the notes? The only one offered is, that he made a mistake in

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computing the time when he would have to appear. How was he mistaken? That he does not attempt to explain. The rule is, that a party seeking to set aside a default must affirmatively show diligence and state facts which will excuse his neglect. Conclusions and abstract statements which might raise a surmise are not sufficient. The court to which an application to set aside a default is addressed cannot make apologies or invent excuses for a defaulting defendant. He must unequivocally state the facts which clearly establish excusable neglect.

And here it should be observed that the statement in the majority opinion to the effect that the first actual knowledge disclosed by the record that Gumaer had of the pendency of the action, was when he received the papers in New York, is not justified. Mr. Gumaer does not say so, nor any one else for him. True, the record is silent on the subject, but silence does not affirmatively establish a fact which, if material, it is encumbent upon him to prove.

The statement in the affidavit of the defendant to the effect that Mrs. Gumaer was without business experience, and was not sufficiently advised regarding the subject matter of litigation so that she could intelligently consult with counsel, is of no moment. In the first place, it appears that Mr. Gumaer had already consulted counsel with respect to the notes; and, had his wife exercised reasonable diligence in advising him of the service of process, as she was in law bound to do, he could readily have taken steps to prevent a default; and next, the want of knowledge on the part of Mrs. Gumaer as to defenses which could be interposed, did not excuse her from taking steps to have an appearance entered, or notifying her husband in time after service of process, so that he could have communicated with counsel.

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Reduced to its final analysis, all there is, material, in the affidavit of defendants, is simply this: Mrs. Gumaer held the process until the 10th of August, or until within seven days of the time when appearance would have to be entered, expecting her husband would return about that time. When he did not, she waited three days longer, or until the 13th, only four days before the time for appearance would expire, and then mailed the papers to her husband in New York, when he, in turn, mailed them to his counsel in the city of Denver. They did not reach their destination in time. If this shows such diligence on the part of the defendants as excused their failure to enter an appearance in the time fixed by the process, then they are excused; but it is submitted that it does not. Parties cannot be permitted to disregard the process of our courts, and after default is taken against them, come in and have it set aside, unless it affirmatively appears that they exercised due diligence to prevent a default. The record in this case not only shows that the court did not abuse its discretion in refusing to set aside the default, but that, had it done so, it would have been an abuse of discretion to the prejudice of the plaintiff.

The judgment of the district court in refusing to set aside the default should be affirmed.

[No. 6491.]

MOUNTZ V. APT.

1. CONTINUANCE—*Discretion of Trial Court*—The allowance or denial of an application for continuance is a matter of discretion. Only in case of a manifest abuse of that discretion will the action of the trial court be reviewed—(493).

2. ——*Diligence Required*—Where the applicant delays in presenting his application, after he is aware of the facts upon which he proposes to ask for continuance, the application should be denied—(494).

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On the sixth of the month, the cause was set down for trial on the twentieth of the same month. Shortly before this a witness for the defendant had, to the defendant's knowledge, gone to the State of Ohio, but to what place in particular was unknown to defendant. Six days before the day appointed for the trial his whereabouts were ascertained. No application for delay was made until the day of the trial. The application was held properly denied—(493, 494).

3. EVIDENCE—*Opinions*—A witness who has personal knowledge of particular lands, and from experience or observation knows what character of lands will, in that locality, yield a crop, and what will not, is competent to express an opinion as to the value of such lands—(494).

So a farmer who has lived in the vicinity of particular lands for several years, and has platted and sold land in that neighborhood—(495, 496).

4. APPEALS—*Harmless Error*—The exclusion of evidence which manifestly would not have changed the result is harmless even if erroneous—(496).

So the improper admission of testimony having no relation to the important issue between the parties—(496, 497).

5. ——*Party Concluded By Theory Adopted Below*—Where the complaint is framed upon a particular theory as to the measure of plaintiff's damages, and the case is tried upon the same theory, the defendant not objecting, he will not be heard to assign as error an instruction proceeding upon the same theory—(497).

6. INSTRUCTION—*Non-Direction*—Is not error unless the proper instruction is presented and refused—(498).

Appeal from Otero District Court—Hon. C. S. ESSEX, Judge.

Mr. O. G. HESS for appellant.

Mr. H. M. MINOR and Mr. PAUL M. NORTH for appellee.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The parties to this appeal exchanged real estate. The tract which appellee owned is located at Rocky

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Ford, in this state, while the land—a quarter section—which appellant exchanged therefor is located in the State of Kansas, about thirty-two miles southeast of Dodge City. The appellee did not see the Kansas property, neither did he know anything regarding its value or character, and relied upon the representations of the appellant with respect to its value and the character of its soil. Some time after the trade was consummated, the appellee learned that the Kansas land was not as represented, and brought suit for damages against the appellant. The trial resulted in a verdict and judgment for the plaintiff, in the sum of eighteen hundred dollars, from which the defendant has appealed.

The first point made by his counsel is, that the court erred in refusing an application for a continuance. The ruling complained of was not erroneous. The action of a trial court in refusing an application for continuance is a matter of discretion with that tribunal, and is reversible only in case of manifest abuse of such discretion.—*Byers v. McPhee,* 4 Colo. 204; *The Banker M. & M. Co. v. Allen,* 20 Colo. App. 351; *Keegan v. Donnelly,* 11 Colo. App. 31; *Michael v. Mills,* 22 Colo. 439.

From the record and affidavit filed in support of the motion for a continuance, it appears that on January 6th, 1908, the cause was set for trial for a day two weeks from that date. The ground for the continuance was on account of the absence of a witness. Two days before the order setting the case for trial, the defendant knew that the witness had departed from the state and had gone to Ohio, where his father was ill. He states in his affidavit that he did not know his whereabouts until January 14th, when he was informed that the date when the witness would return was uncertain, on account of the condition of his father. With full knowledge of all these facts, application for a continuance was not made until the day the case was

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set for trial, namely, January 20th. No excuse is offered why the application was not presented at an earlier date. Where a party fails to exercise reasonable diligence in presenting an application for continuance after he is aware of the facts upon which his application is based, it should be denied. *Michael v. Mills, supra;* 9 Cyc. 134.

The next point made is, that the court erred in permitting plaintiff and a witness in his behalf to testify as to the value of the Kansas land, without showing that they were qualified to give such testimony. According to the claim of plaintiff, the defendant had represented the Kansas tract to be worth twelve dollars and a half per acre; that it was a rich, sandy loam soil, covered by a solid mat of buffalo grass, and that it would produce, if cultivated, large and profitable crops of corn, alfalfa, wheat, and other grains. Plaintiff, after the trade was consummated, visited the land with a surveyor who lived at Dodge City. The latter is the witness above referred to. Plaintiff testified that the land consisted principally of sand hills; that there were about five or six acres of level land; that there were places where the sand was drifted five or six feet in depth; that there was very little, if anything, growing on the land that stock would eat; and that on account of its sandy character, it could not be cultivated with profit. Plaintiff was an experienced farmer. The surveyor testified that the soil was sand and sandhills, with a few little valleys between; that there were probably five or ten acres of level land; that the land would produce nothing; that if broken up the wind would drift the sand and cover the crops. He had lived in that locality for about four years, and knew from observation what character of land would produce crops, and what would not. The testimony of both the plaintiff and the surveyor was further to the effect that the land was practically valueless, or not

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worth more than the government price, $1.25, per acre. A witness having personal knowledge of the character of a piece of land, and who, from experience or observation, knows what character of land will produce crops, and what will not, is competent to form an intelligent estimate as to its value for agricultural purposes. Applying this rule, we think it is clear that the witnesses were qualified to give an opinion regarding the value of the Kansas tract.

It is also urged that a witness for plaintiff was permitted to testify to the value of the Rocky Ford land without being qualified. It appears that this witness was a farmer; that he had lived in the vicinity of Rocky Ford for several years and had platted and sold land in that neighborhood. We think this disclosed sufficient qualification to permit him to give his testimony.

The defendant was asked if he knew what the Kansas land was worth at the time he traded it to the plaintiff. He was also asked if he knew what the Rocky Ford land was worth at that time. Objections were interposed to each of these questions, and sustained. We think the defendant should have been allowed to answer these questions; but the record affirmatively shows that if he had, the result of the trial would not have been different from what it was. The testimony with respect to the value and character of the Kansas land was overwhelmingly to the effect that it was practically valueless. Aside from this, when we consider the real issue of fact upon which the value of this land depended, it is apparent that the ruling of the court in not permitting the defendant to give his estimate of its value in dollars could not have prejudiced him. The testimony and circumstances are such that there can be no doubt but that defendant grossly misrepresented its character and value. Certainly, plaintiff would not have knowingly traded his land, well worth two thousand dollars, for a quarter section

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of sandhills. He claimed the defendant had represented to him that the soil of the Kansas tract was a good, rich, and sandy loam, and would produce good crops. In addition to the testimony of plaintiff and the surveyor as to the character of this land, there was the testimony of another witness, who had visited it, whose evidence, from the description given, tended even more strongly to establish its worthless character. Defendant had been upon the land and testified as to its character and soil. Its value for agricultural purposes (and it is not claimed that it was valuable for any other) depended principally upon whether crops could be raised thereon or whether it consisted of sandhills and drifting sand. If of the latter character, it was patent to any one that it was of little value. Necessarily, from the verdict returned, the jury resolved the question of fact with respect to the character of the soil in favor of plaintiff, and we might add, from the testimony could not have found otherwise; so that it is apparent the defendant was not precluded from giving any testimony which could have changed the result or have assisted the jury in determining its value. The testimony with respect to the Rocky Ford land, as stated by several witnesses, was to the effect that it was fully worth the sum which the defendant had represented the Kansas tract to be worth; so that whatever answer the defendant might have made to the questions objected to, could not possibly have changed the result. Error without prejudice will not work a reversal.

A witness for plaintiff testified to the conversation between the parties at the time the trade was made, and also to the terms and conditions upon which it was closed. It is contended that the court required or permitted the witness to state his conclusions with respect to this conversation. This might be a serious question were it not for the fact that the important issues be-

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tween the parties were the value and character of the Kansas land, and the representations of the defendant on that subject. The error complained of did not relate to either of these questions.

The final question urged is, that the court did not correctly instruct the jury as to the measure of damages. On this subject the court instructed the jury to the effect that if they found the issues in favor of the plaintiff, then, in determining his damages they should take into consideration the reasonable market value of the respective tracts of land. This, it is claimed, was erroneous, for the reason that the measure of damages was the difference between the value of the Kansas land at the date of the trade and its value as represented to be. The pleadings did not present this question. The complaint was framed upon the theory that the damages sustained by plaintiff was the difference in the market values of the respective tracts. The defendant, by his answer, without objection, accepted this theory of the complaint. Both parties tried the case upon this theory. At no time did the defendant object to it as not being correct; and very properly, the court instructed the jury on the theory of the case as outlined by the pleadings and upon which it was tried. Where a cause is submitted to a jury upon the theory adopted and acquiesced in by the parties, neither will be heard to complain that it was erroneous.—*De St. Aubin v. Marshal Field & Co.*, 27 Colo. 414.

It is also claimed that the instruction under consideration was not sufficiently explicit, and that the other instructions were faulty, because the court should have instructed the jury on the law governing an action for deceit. Error cannot be predicated on the instruction on the subject of damages, for the reasons given. It is not claimed that the other instructions were erroneous. If any of them were not sufficiently full or explicit, or if further instructions were desired on

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the law of deceit, the defendant should have made requests covering these omissions. He did not. We have repeatedly decided that mere non-direction is not error, unless the proper instruction was tendered and refused.—*Sandberg v. Borstadt*, 48 Colo. 97; *Donley v. Bailey, ibid*, 373.

The judgment of the district court is affirmed. In affirming the judgment, however, we must not be understood as holding that errors in the trial of a cause can be committed with impunity. A party has a right to have the trial court observe the usual rules of evidence, whether the facts are in slight or serious dispute.—*Colo. Midland Ry. Co. v. McGarry*, 41 Colo. 398. Captious objections to the introduction of testimony frequently compel the reversal of meritorious cases; but where, as in the case at bar, it is clear beyond question that errors committed at the trial did not prejudice the rights of the complaining party, and that the verdict and judgment are, without doubt, correct, they will be disregarded on review.

Judgment affirmed.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE HILL concur.

[No. 6682.]

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION V. CAMBRON.

The errors assigned relating only to the evidence, and that being found sufficient the judgment was affirmed.

Error to Pueblo County Court—Hon. FRANK G. MIRICK, Judge.

Mr. J. NORMAN, Mr. HARRY E. KELLY and Mr. CHARLES H. HAINES for plaintiff in error.

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Mr. JAMES A. PARK for defendant in error.

Per Curiam, Department Two.

The errors assigned involve only the evidence, and a discussion of that would but result in an affirmance. We are satisfied that there is sufficient in the evidence to sustain the judgment, and it is, therefore, affirmed.

Judgment affirmed.

Decided October 2, 1911; rehearing denied December 4, 1911.

[No. 6985.]

EPLEY V. THE PEOPLE.

Judgment affirmed on the authority of Epley v. The People, *post 501*.

Error to Larimer County Court—Hon. FRED W. STOVER, Judge.

Messrs. STARK & MARTIN for plaintiff in error.

Hon. JOHN T. BARNETT, attorney general, and Mr. ELMER L. BROCK for the people.

Mr. JUSTICE HILL delivered the opinion of the court:

The plaintiff in error was convicted of selling intoxicating liquors in anti-saloon territory; he brings the case here for review upon error.

It is agreed between counsel that the facts and the assignments of error in this case are practically identical with those in case No. 6987, entitled *Austin Epley*, plaintiff in error, *v. The People of the State of Colorado*, defendant in error, (decided at this term). The cases were argued together.

For the reasons stated in the case above referred to, the judgment in this case is affirmed.

Affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 6986.]

EPLEY V. THE PEOPLE.

Judgment affirmed on the authority of Epley v. The People, *post 501.*

Error to Larimer County Court—Hon. FRED W. STOVER, Judge.

Messrs. STARK & MARTIN for plaintiff in error.

Hon. JOHN T. BARNETT, attorney general, and Mr. ELMER L. BROCK, of counsel for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

The plaintiff in error was convicted of selling intoxicating liquors in anti-saloon territory; he brings the case here for review upon error.

It is agreed between counsel that the facts and the assignments of error in this case are practically identical with those in case No. 6987, entitled *Austin Epley,* plaintiff in error, *v. The People of the State of Colorado,* defendant in error, (decided at this term). The cases were argued together.

For the reasons stated in the case above referred to, the judgment in this case is affirmed.

Affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 6987.]

EPLEY V. THE PEOPLE.

1. CONTINUANCE—*Discretion*—Whether in a criminal prosecution a continuance shall be granted or refused depends upon the showing made, the gravity of the offense, and other considerations, and is largely in the discretion of the trial court. Unless there is an abuse of discretion its ruling will not be reviewed—(503).

Defendant was accused of illegally selling intoxicating liquors in Larimer County. On the third of the month he was arraigned and pleaded, and the trial was appointed for the eighth of the same month. On the day of trial he appeared in person and by an attorney, and applied for a continuance, alleging as ground thereof that on account of the intervention of two holidays he had not been able to employ counsel until the seventh; that the attorney employed to conduct his defense resided in Denver; that he had not been able to intelligently advise him as to the offense with which he was charged, and that upon that day the attorney was employed in the federal court. No reason was shown for the employment of this particular gentleman, or for not employing some one of the able gentlemen of the bar residing in Larimer County. The counsel who actually conducted the defense appeared to have been entirely competent and the record showed no omission or neglect on his part. *Held*, that in denying the application, no abuse of discretion appeared—(502-504).

2. WRIT OF ERROR—*Abstract*—An objection not shown by the printed abstract to have been taken below will not be considered—(505).

3. ——*Harmless Error*—In a prosecution for the unlawful sale of intoxicating liquors the only sales testified of were shown to have been made before the information was presented, and within the statute of limitations; an instruction not limiting the jury in these respects was held harmless—(505, 506).

4. EVIDENCE—*Party As Witness—Manner in Testifying*—In a criminal prosecution the accused is sworn in his own behalf. The jury may consider his manner in testifying and demeanor upon the stand in determining the weight to be accorded to his testimony, and it is proper to so instruct. Boykin v. the People, 22 Colo. 496, followed—(507).

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Error to Larimer County Court—Hon. FRED W. STOVER, Judge.

Messrs. STARK & MARTIN for plaintiff in error.

Hon. JOHN T. BARNETT, attorney general, and Mr. ELMER L. BROCK for the people.

Mr. JUSTICE HILL delivered the opinion of the court:

The plaintiff in error was convicted of selling intoxicating liquors in anti-saloon territory; he brings the case here for review upon error.

It is urged that the court erred in refusing to grant a continuance for the purposes of allowing the defendant to secure counsel and prepare for trial. He was arrested on September the 3rd, 1909; arraigned upon the same day; pleaded not guilty and his trial was set for September the 8th following. While the record brought up does not disclose the fact, he was evidently admitted to bail or allowed to go upon his own recognizance, for his affidavit shows that he was in Denver between that date and September the 8th, the date on which his case was set for trial. On the morning of the 8th when his case was called for trial, he appeared in person and by counsel and filed his motion for a continuance, which stated as reasons therefor, that he was not served with the information until the 3rd day of September, 1909; that he had not had sufficient time within which to prepare for his defense; that he had not been served with a copy of the information and was wholly unprepared to proceed with the trial; that by reason of the fact that he had not been served with a copy of the information, he did not know its contents so as to intelligently acquaint his counsel with the crime with which he was charged; that since the time of his arrest until the date set for trial, two legal holidays had intervened and upon account there-

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of he was unable to employ counsel until the afternoon of Tuesday, September the 7th; that his counsel was engaged in a hearing before the United States Circuit Court of Appeals on said 8th day of September; that his counsel had not been able to receive a copy of said information and was wholly unprepared to proceed with the trial of the cause. This motion was supported by an affidavit of the attorney, a resident of the city of Denver, also one by the defendant. These affidavits were practically a repetition of the statements in the motion, with no further details or reasons set forth in either.

The matter of granting a continuance is largely in the discretion of the trial court, depending upon the showing made, including the gravity of the offense, and other matters necessary to be considered, and, unless there is an abuse of such discretion, its rulings will not furnish grounds for reversal.—*Byers v. McPhee et al.*, 4 Colo. 204; *Roberts v. The People*, 9 Colo. 458; *Jarvis v. Shacklock*, 60 Ill. 378; *Graff v. Brown*, 85 Ill. 89; *Baumberger v. Arff*, 96 Calif. 261.

It is very questionable whether this motion presents any reason why the defendant should have been allowed any continuance at all, other than to suit the convenience of certain counsel whom he desired to have represent him. There are no facts given why the defendant was entitled to the services of any particular counsel, or why his case could not have been defended by any counsel of ordinary ability. There are no facts presented why the defendant could not have secured counsel in his home City of Fort Collins, the county seat of a large county, a city of considerable population and unquestionably possessed of a very able bar of considerable number, likewise, the adjoining cities of Longmont, Loveland, Greeley and Boulder, all of which, it is common knowledge, have a great many excellent attorneys, and we must assume, in the absence of a

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showing to the contrary, that in the exercise of ordinary diligence during the length of time allowed, that the services of many excellent attorneys could have been secured. We do not mean by this that a defendant is not entitled, ordinarily, to the counsel of his choice, and District Attorneys, as well as the courts, in the exercise of a sound discretion, should try to arrange cases so that counsel, as far as consistent, can be accommodated in this respect; but we cannot say that there was an abuse of discretion upon the refusal of the court to grant him a continuance for this reason without any showing why he should have done so, when his own statements are to the effect that he left his home city and many others intervening and came to the city of Denver and procured the services of one counsel only, who, it appears, upon the day set for trial in Fort Collins, was engaged in the trial of another cause in the federal courts in the city of Denver, and that he knew he would be thus engaged when he employed him, and without any showing to the trial court as to why he should have been entitled to the services of this particular counsel, or in what manner his rights would not have been protected by securing the services of other counsel who could have appeared at that time. There is no showing that he attempted to secure other counsel, even in Denver, other than the one who it appears was employed for the purpose of presenting his motion for a continuance, and who the record shows continued in the case thereafter, and conducted the defense. It will be observed that the counsel desired had not theretofore been retained and relied upon to conduct the defense, and, the case as the record shows, was not of a complicated character, involving extraordinary skill or ability upon behalf of counsel. The offense charged is not grave and there is no showing of any fact in the motion for rehearing wherein the defendant's rights were in any manner prejudiced, jeopardized or neg-

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lected by failure to grant this continuance. To the contrary, the record discloses that the counsel who did appear and defend appears to have been perfectly able and competent to present and take care of the defendant's side of this contention, and we are unable to believe that the defendant's rights were neglected in this respect.

The second contention urged pertains to the admission of the testimony to establish that the city of Fort Collins was anti-saloon territory. It is stated in the brief of the plaintiff in error that this testimony was admitted, over the objections of the defendant. The attorney general contends that no proper or competent objections were made to any of this testimony. The printed abstract of the record fails to show that any objections were made to it. The question, therefore, is not properly before us for consideration.

Complaint is made to the giving of Instruction No. 4, it reads:

"The exact date of the sale, if any, is not material and need not be proven as alleged. The gist of the offense being the unlawful sale and not the day when it was made. If you find and believe from the whole evidence in the case, that the material allegations have been proven beyond a reasonable doubt, you should convict the defendant in such case, and if you do not so find and believe from the evidence, beyond a reasonable doubt, you should give the defendant the benefit of the doubt and acquit him."

It is contended, that no provision was made in this instruction protecting the rights of the defendant under the statute of limitations may in the event that the sale was made prior to the time that Fort Collins became anti-saloon territory; that under this instruction the jury was justified in finding the defendant guilty, though the sale was made years before the time alleged in the information; also, that the defendant,

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could have been found guilty if the sale was made after the filing of the information. We cannot agree with any of these contentions. The instructions must be considered as a whole. Instruction No. 3 advises the jury as to the material allegations in the information which must be proved, as mentioned in Instruction No. 4. No. 3, in part, reads as follows:

"The material allegations which the People must prove beyond a reasonable doubt are that the defendant, on or about the 17th day of last August, within this city, county and state, did unlawfully sell, * * * * and also that the city of Fort Collins was then and there anti-saloon territory."

The jury were further told that no one instruction covers all the law, also that they must find from the evidence beyond a reasonable doubt.

The only evidence of any sale by the defendant was as to sales made on August 17th and 23rd or 24th, so that the jury could not have been misled as to the sales referred to, no other was attempted to be established by the evidence. Hence, under the instructions, the jury could not have found the defendant guilty of making a sale at a date barred by the statute of limitations, or prior to the time that Fort Collins became anti-saloon territory, or subsequent to the filing of the information, for the reason, that there was no evidence before them upon which such a verdict could have been reached. While it is true that instructions of this kind, which advise that the time is immaterial, should limit it within the period of the statute of limitations, on the one side, and the date of the filing of the information on the other, and that in certain cases it would be prejudicial error by a failure so to do, yet we do not think the defendant was in any manner prejudiced by the court's failure to do so. In addition, had he desired to have the question of time more specifically defined, it was his privilege to have offered instructions upon

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that subject; not having done so, and being in no way prejudiced upon account of this instruction (even though it was technically erroneous) he has no reason to complain concerning it. Our views concerning the effect of this instruction under the facts of this case, are, in substance, approved in the following cases.—*Phillips v. State*, 45 S. W. (Tex.), 709; *Commonwealth v. Cobb & another*, 80 Mass. 57; *Ferguson v. State*, 52 Neb. 432; *State v. Fry, et al.*, 67 Iowa 475; *State v. Williams*, 43 Pac. (Wash.) 15; *State v. Thompson*, 27 Pac. (Mont.) 349; *State v. Harp*, 3 Pac. (Kan.) 432.

Complaint is also made to the giving of instruction No. 8, which refers to the fact that the defendant had testified as a witness in his own behalf and that in determining the weight to be given his testimony, the jury had the right to take that fact and his demeanor upon the stand, etc., into consideration. The cases of *Banks v. State*, 101 Pac. (Okla.) 610 and *Mitchell v. State*, 101 Pac. (Okla.) 1100 are cited to sustain the defendant's position. Whatever may be the ruling in other jurisdictions, the substance of this instruction was approved by this court in the case of *Boykin v. The People*, 22 Colo. 496, where this matter was thoroughly gone into and the entire question discussed. We find no prejudicial error in this respect.

The judgment is affirmed. *Affirmed.*

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

Decided November 6, 1911; rehearing denied December 4, 1911.

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[No. 5802.]

KIRBY ET AL., V. COLORADO & SOUTHERN RAILWAY COMPANY.

Judgment affirmed on the authority of the case of Kirby v. The Union Pacific Railroad Co. *post* 509.

Error to Pueblo District Court—Hon N. WALTER DIXON, Judge.

Messrs. WHITFORD & MAY and Mr. O. N. HILTON for plaintiffs in error.

Messrs. DINES, WHITTED & DINES and Mr. P. H. HOLME for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The matters in controversy here, with the exception of the payment of the flat license tax provided for by statute, not in dispute in this case, are substantially like those, and were submitted and determined on the same evidence, involved in case No. 5803, *William F. Kirby, et al., v. The Union Pacific Railway Company*, just decided by this court. Upon the authority of that decision the judgment and decree herein is affirmed.

Judgment affirmed.

Decision *en banc*.

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE WHITE not participating.

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[No. 5803.]

KIRBY ET AL. V. UNION PACIFIC RAILWAY COMPANY.

1. PASSENGER CARRIER—*Non-Transferable Tickets*—A railway company may lawfully issue tickets which are not transferable by the holder. The condition which prohibits transfer is a legal contract, and the railway company is under no obligation to carry a person presenting such ticket, unless he is in fact the original purchaser—(514).

Such tickets are not property in the hands of the purchaser in such sense that they can be sold. Dealing therein is a fraud both upon the railway and the traveling public and cannot be made a legitimate business—(515).

A railroad ticket is a mere token to show that the person properly in possession of it has paid his fare. If transferred in violation of its terms, it is no longer property in an sense, but as much under the ban of the law as counterfeit money.

2. INJUNCTION—*Protection of a Lawful Business Against Unlawful Interference*—One who prosecutes a lawful business has a property therein, and is entitled to protection against unlawful interference therewith—(515).

A railroad company had for a long time, issued tickets entitling the holder to proceed to destination and return, for a single fare. These tickets were expressly declared, upon the face thereof to be non-transferable.

The defendants were engaged in the purchase of the portion of these tickets entitling the holder to return, and the sale thereof to strangers, whom they instructed to falsely impersonate the original purchaser. They declared their purpose to continue in this course of illicit dealing. By this abuse of the ticket, practically impossible to detect, and by the frauds so habitually practiced, the railway company was deprived of enormous gains to which it was entitled. *Held*, that on the ground of constantly recurring wrong, the avoidance of a multiplicity of actions, and irreparable injury, a clear case for injunctive relief was presented—(521, 522).

3. ——*Estoppel—Connivance*—That the plaintiff had on previous occasions sold like tickets to the defendants and connived at the sale thereof by defendants to others was held no bar to the relief prayed, each sale of such non-transferable tickets being a new and independent wrong, distinct from former transactions—(522, 526).

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4. ——*Estoppel by Conduct*—That the railroad company had for a long time patiently suffered the wrongful conduct of defendants, no evidence of good faith on the part of defendants being given, and it not appearing that defendants conduct had in any manner been changed, or that defendants had been in any degree misled by anything done or omitted by the railroad company, was held no estoppel.

The doctrine of equitable estoppel is never available to sustain crime, fraud, or active misconduct of any character.

No defense to the plaintiff's action was presented by the doctrine of laches and acquiescence—(526-534).

5. ——*Preliminary—Affidavit*—If the defendant against whom a preliminary injunction has been issued without notice, no emergency existing, would avail himself of the final proviso of sec. 148 of the code as amended by the act of 1903 (Laws 1903, c. 117, Rev. Code sec. 164), he must move in the trial court. Failing in this he will not be heard to make the objection in the court of review—(543).

The record held to show an emergency, within the meaning of the statute entitling plaintiff to a preliminary injunction without notice—(544).

6. EQUITY—*Maxims—Coming With Clean Hands*—To deprive the complaining party of equitable relief evil practice in the very matter in respect to which redress is sought must be shown. Equity does not repel all sinners—(525).

7. CORPORATIONS—*Foreign—License Tax*—Under the decision of the supreme court of the United States in American Co. v. Colorado, 204 U. S. 103, the license tax imposed by the Revenue Act of 1902 (Laws 1902 c. 3, sec. 65), cannot be exacted from a corporation, which, before its enactment, had paid the entrance tax requested by those entering legislation, and secured a license to do business in this state—(542).

8. CHANGE OF VENUE—Sections 25 and 25a of Mills' Code (Rev. Code secs. 25 and 26) refer exclusively to actions *in rem*, where specific property is directly affected. An action to restrain interference with the business of a railway company by unlawful dealing in its non-transferable tickets is a transitory action in *personam*. The sections quoted have no reference to such action—(535).

9. ——*Waiver of the Motion*—An application for the change of the venue must be made as soon as the moving party has knowledge of the facts which entitle him to the change. A general appearance and pleading to the merits is a waiver of the rights—(541, 542).

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Error to Pueblo District Court—Hon. N. WALTER DIXON, Judge.

Mr. O. N. HILTON and Mr. RALPH TALBOT for plaintiffs in error.

Messrs. DORSEY & HODGES and Mr. JOHN L. BALDWIN for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

This is one of eight cases, by as many railroad companies, operating in the state of Colorado, for injunctive relief, against some sixty-five defendants, railroad ticket brokers or scalpers, located at Denver, Pueblo, Colorado Springs, Trinidad and other Colorado cities, to prevent the alleged fraudulent and wrongful interference by the defendants with the lawful business of the plaintiff, in the issuance and sale of nontransferable signature tickets. The complaint charges in substance that the defendants are engaged in negotiating the sale of nontransferable tickets, or the return portions thereof, and in aiding and procuring other than the original purchasers to secure, or attempt to secure, passage upon the various trains of the plaintiff, on such nontransferable signature tickets, contrary to the express terms thereof; that the defendants have organized into associations for the purpose of carrying on such wrongful and fraudulent business, and that as a result the plaintiff is suffering great pecuniary loss, and is about to suffer still greater damage, unless such conduct be prevented; and that plaintiff has no adequate remedy at law, because of the difficulty of detecting such frauds, because of the multiplicity of suits that would be required, because of the insolvency of practically all of the various defendants, and for other reasons specifically set forth in the complaint. It is definitely alleged that the defendants

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have engaged, are now engaging and will continue to engage in dealing in this character of tickets. These allegations are not only not denied, but it is expressly averred by the defendants that they are now engaged in such practices and intend to continue the same in the future. At folio 158 of the answer it is expressly averred: "And these defendants admit that they have sold, and are engaged in the business of selling, and purpose to and will continue in the business of selling and regularly dealing in, said nontransferable tickets, issued for transportation over plaintiff's railway." The defendants further, by answer, deny that they are engaged in an unlawful business, and aver that they have been dealing for years in the character and kind of tickets mentioned in the complaint without hindrance on the part of the railroad company, and allege connivance by it, in their conduct in this behalf, and laches and acquiescence. They deny any fraud, and allege that the railroad company has no legal right to embody stipulations of nontransferability in its tickets, and that such limitations are of no legal force and are not binding.

Not only is the principal fact admitted, but the various fraudulent devices adopted by the defendants, including forgery of tickets, the raising of the limit of tickets, the forging of the name of the original purchaser by the broker, or by some other person through his procurement, the methods adopted for deceiving the conductors on the trains of plaintiff, and the instructions given to the purchasers of such tickets, in order that they may successfully impersonate the original purchasers, are all testified to by witnesses for the plaintiff, and no evidence is offered to refute this showing. The evidence establishes conclusively that these practices have resulted, and will result in enormous financial losses to the plaintiff, and will render it practically impossible for railroad companies to continue

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to grant special rates for special occasions, and there is no evidence by defendants to the contrary. The evidence of persistent and continued interference by the brokers, in manner and form as alleged, with the business of plaintiff, in the issuance and sale of nontransferable tickets, causing and threatening to cause great financial loss, is overwhelming and convincing.

A temporary writ of injunction issued, enjoining the defendants from buying, selling, dealing in or soliciting the purchase or sale of tickets, or of the return or unused portions thereof, issued by plaintiff over its lines, which are by their terms nontransferable, and from soliciting, advising, encouraging, procuring, or attempting to procure, any person or persons other than the original purchasers to use such tickets. On final hearing the temporary writ was made permanent. Defendants bring the case here for review on error.

The grounds upon which the defendants rely for a reversal of the judgment and decree complained of are:

1. That the complaint states no cause of action cognizable by a court of equity, because, it is claimed, the railroad company could not lawfully impose the limitations contained in nontransferable tickets; that no actual damage has been shown; and that the defendants are guilty of no legal wrong;

2. That the plaintiff companies have, if entitled to any relief, a plain, speedy and adequate remedy at law;

3. That the court had no power or authority, by temporary or permanent injunction, to assume to govern and control the future acts of defendants in the purchase and sale of so-called nontransferable tickets, or unused portions thereof;

4. That plaintiffs are estopped to maintain the action, because of laches, connivance and acquiescence in like conduct by the defendants covering a time prior

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to the application for the injunction;

5. That the defendant company is precluded from maintaining this action at all, because of its failure to pay the annual state license tax provided by statute;

6. That the court erred in refusing to discharge the temporary restraining order, issued without notice, and dismiss the action, upon the ground that it is not shown that any emergency existed for its issuance; and,

7. That it was error in the court to overrule the separate motions of two of the defendants for a change of venue.

Every fundamental and vital contention of the defendants has been adjudged against them by an overwhelming weight of authority. The following legal propositions are definitely settled and fixed in cases resting upon similar facts to those shown in the present record:

1. That a clear case of equitable jurisdiction, on the grounds of irreparable injury, inadequacy of a legal remedy, and of the necessity of avoiding a multiplicity of suits, is made out under circumstances and conditions such as are here alleged and proven.—*Nashville C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Kinner v. Lakeshore & M. S. R. Co.*, 69 Ohio St. 399; *Pennsylvania R. Co. v. Beekman*, 30 Wash. L. Rep. 715; *Illinois C. R. Co. v. Caffrey*, 128 Fed. 770; *Schubach v. McDonald*, 179 Mo. 163; and *Bitterman v. L. & N. R. Co.*, 207 U. S. 205.

2. That the contract evidenced by nontransferable tickets described in the complaint is a legal contract between the railroad company and the purchaser of such tickets, and binds the parties thereto and limits the benefits of the contract to the use of the original purchaser only; that no one other than such purchaser can become the beneficiary of such contract, and under its terms the railroad company is under no obligation

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to carry as a passenger any person presenting such ticket, unless such person is in fact the original purchaser.—*Mosher v. St. Louis I. M. & S. R. Co.*, 127 U. S. 390; *Eastman v. R. R. Co.*, 70 N. H. 240; *Way v. Chicago, etc., Rwy. Co.*, 64 Ia. 48; *Demilley v. T. & N. O. Ry. Co.*, 91 Tex. 215; *Dangerfield v. Railway Co.*, 62 Kan. 85; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146; *Drummond v. Southern P. R. Co.*, 7 Utah 118; *Bitterman v. L. & N. R. Co., supra;* and 4 Elliott on Railroads, Sec. 1599.

3. That such tickets are not property in the hands of the purchaser, in the sense that they can be transferred or sold, and trafficking in them is not and cannot be made a legitimate business.—*State v. Corbett*, 57 Minn. 345; *Jannin v. State*, 42 Tex. Crim. Rep. 631; *Burdick v. People*, 149 Ill. 600; *Drummond v. Southern P. R. Co., supra; Pennsylvania R. Co. v. Beekman, supra; Schubach v. McDonald, supra; Nashville C. & St. L. R. Co. v. McConnell, supra;* and 4 Elliott on Railroads, Sec. 1593.

4. That the business of a person or corporation is property which is entitled under the law to protection from unlawful interference, and such interference may be prevented by injunction. *National Teleg. News Co. v. Western Union Teleg. Co.*, 60 L. R. A. 805; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212; *Flaccus v. Smith*, 199 Penn. 128; *Scott v. Donald*, 165 U. S. 107; *Sherry v. Perkins*, 147 Mass. 212; *Nashville C. & St. L. R. Co. v. McConnell, supra; Railway Co. v. Bitterman*, 144 Fed. 34; *Lake Shore & Michigan So. Ry. Co. v. Smith*, 173 U. S. 684; and *Smyth v. Aimes*, 169 U. S. 466.

5. That by the scalping of its nontransferable tickets the railroad company sustains a pecuniary loss. There is no process of reasoning, however strained, which can even as a matter of form conceal the ultimate fact, that the company is deliberately cheated out of the regular fare on every mile of its line on which

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travel is made under color of one of these tickets in the hands of any one other than the original purchaser. —*Angle v. Chicago St. P. M. & O. R. Co.*, 151 U. S. 1; *Flaccus v. Smith, supra; Raymond v. Yarrington*, 96 Tex. 443; *Illinois Central Rwy. Co. v. Caffrey, supra; Nashville C. & St. L. R. Co., v. McConnell, supra;* and *Bitterman v. L. & N. R. Co., supra.*

The decision in *Bitterman v. Louisville & N. R. Co., supra,* decided since this case was lodged here, is conclusive against these defendants upon every controlling question. In the opinion in that case, by the present Chief Justice of the United States supreme court, is was said, among other things:

"As, for reasons hereafter to be stated, we think the contentions embodied in the first proposition as to want of jurisdiction, etc., are without merit, we come at once to the fundamental question involved in the second proposition; that is, the absence of averment or proof as to the commission of a legal wrong by the defendants.

That the complainant had the lawful right to sell nontransferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of nontransferability and forfeiture embodied in such tickets was not only binding upon the original purchaser, but upon any one who acquired such a ticket and attempted to use the same in violation of its terms, is also settled. (Cases cited.) * * * *

Any third person acquiring a nontransferable reduced-rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such a ticket acquired anything more than a limited and qualified ownership

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thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture retain a subordinate interest in the ticket, amounting to a right of property therein, which a court of equity would protect.—*Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, and authorities there cited. See also, *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. Rep. 800. We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court.—The case is *Angle v. Chicago, St. Paul etc., Ry. Co.*, 151 U. S. 1, where it was held that an actionable wrong is committed by one who 'maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other.' That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling nontransferable reduced rate railroad tickets for profit, to the injury of the railroad company issuing such ticket is, we think, clear. It is not necessary that the ingredient of actual malice in the sense of personal ill will should exist to bring this controversy within the doctrine of the Angle case. The wanton disregard of the rights of a carrier causing injury to it, which the business of purchasing and selling nontransferable reduced rate tickets of necessity involved, constitute legal malice within the doctrine of the Angle case. We deem it unnecessary to restate the grounds upon which the ruling in the Angle case was rested, or to trace the evolution of the principle in that case announced, because of the consideration given to the subject in the Angle case and the full reference to the authorities which was made in the opinion in that case.

Certain it is that the doctrine of the Angle case has been frequently applied in cases which involved

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the identical question here at issue—that is, whether a legal wrong was committed by the dealing in nontransferable reduced rate railroad excursion tickets. (Cases cited.)

Indeed, it is shown by decisions of various state courts of last resort that the wrong occasioned by dealing in nontransferable reduced rate railroad tickets has been deemed to be so serious as to call for express legislative prohibition correcting the evil. (Cases cited).—*Samuelson v. State*, 95 S. W. Rep. 1012. In the case last referred to, where the subject is elaborately reviewed, the supreme court of Tennessee, in holding that the prohibitive statute was not unconstitutional as forbidding a lawful business and in affirming a crimal conviction for violating the statute observed:

'That the sale as well as the purchase of nontransferable passage tickets is a fraud upon the carrier and the public, the tendency of which is the demoralization of rates, has been settled by the general consensus of opinion amongst the courts.'

Concluding, as we do, that the commission of a legal wrong by the defendants was disclosed by the case as made, we are brought to consider the several contentions concerning the jurisdiction of the court and its right to afford relief."

Upon the question of the right to relief by injunction in a case like this, further on in that opinion, the writer thereof has this to say:

"The contention that, though it be admitted, for the sake of the argument, that the acts charged against the defendant 'were wrongful, tortious, or even fraudulent,' there was no right to resort to equity because there was a complete and adequate remedy at law to redress the threatened wrongs when committed is, we think, also devoid of merit. From the nature and character of the nontransferable tickets, the number of

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people to whom they were issued, the dealings of the defendants therein and their avowed purpose to continue such dealings in the future, the risk to result from mistakes in enforcing the forfeiture provision and the multiplicity of suits necessarily to be engendered if redress was sought at law, all establish the inadequacy of a legal remedy and the necessity for the intervention of equity. In deed the want of foundation for the contention to the contrary is shown by the opinions in the cases which we have previously cited in considering whether a legal wrong resulted from acts of the character complained of, since in those cases it was expressly held that the consequences of the legal wrong flowing from the dealing in nontransferable tickets were of such a character as to entitle an injured complainant to redress in a court of equity."

Upon the proposition that the court erred in issuing the temporary injunction and making it permanent against dealing in nontransferable tickets to be issued in the future, in this same opinion the learned Chief Justice said:

"The circuit court of appeals decided that error had been committed in refusing to grant an injunction against dealing in nontransferable tickets to be used in the future, and directed that the decree below be enlarged in that particular. It is insisted that the circuit court of appeals erred in awarding an injunction as to dealings 'in nontransferable tickets that may be hereafter issued * * * since it thereby undertook to promulgate' a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit 'the petitioners from dealing in tickets not *en esse* * * * and is, therefore, violative of the most fundamental principles of our government.' But when the broad nature of this proposition is considered it but denies that there is power in a court of equity in any case to afford effective relief by injunction. Certain

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is it that every injunction in the nature of things contemplates the enforcement as against the party enjoined of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. See *Slater v. Gunn*, 170 Massachusetts 509, and cases cited. It may not be doubted that the authority of a court would extend, not only to restraining a particular imminent trespass, but also to prohibiting like acts for all future time. The power exerted by the court below which is complained of was in no wise different. The bill averred the custom of the complainant at frequently occuring periods to issue reduced rate nontransferable tickets for fairs, conventions, etc., charged a course of illegal dealing in such nontransferable tickets by the defendants, and sought to protect its right to issue such tickets by preventing unlawful dealings in them. The defendants in effect not only admitted the unlawful course of dealing as to particular tickets then outstanding, but expressly avowed that they possessed the right, and that it was their intention to carry on the business as to all future issues of a similar character of tickets. The action of the circuit court of appeals, therefore, in causing the injunction to apply not only to the illegal dealings as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful. Indeed, in view of the state of the record, the inadequacy of the relief afforded by the decree as entered in the circuit court is, we think, manifest on its face. The necessary predicate of the decree was the illegal nature of the dealings by the defendants in the outstanding tickets, and the fact that such dealings, if allowed, would seriously

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impair the right of the complainant in the future to issue the tickets. Doubtless, for this reason the decree was made without prejudice to the rights of the complainant to apply for relief as to future issues of tickets by independent proceedings whenever on other occasions it was determined to issue nontransferable tickets. But this was to deny adequate relief, since it subjected the complainant to the necessity, as a preliminary to the exercise of the right to issue tickets, to begin a new suit with the object of restraining the defendants from the commission in the future of acts identical with those which the court had already adjudged to be wrongful and violative of the rights of the complainant.

In *Scott v. Donald*, 165 U. S. 107, on holding a particular seizure of liquor under the South Carolina dispensary law to be invalid, an injunction was sustained not only addressed to the seizure in controversy but also operated to restrain like seizures of liquor in the future, and the exertion of the same character of power by a court of equity was upheld in the cases of *Donovan v. Pennsylvania Company*, 199 U. S. 279, and *Swift v. United States*, 196 U. S. 375."

It is not only plainly established by the evidence that a direct pecuniary loss is inflicted upon the carrier by the wrongful dealings of brokers in these nontransferable tickets, but in addition to this loss it appears that the carrier's business in general is thereby seriously cripple and interfered with; and it is manifest that the railroad company is without an adequate remedy at law for such violation of its ticket contracts, and the resultant harmful interference with its business, for to bring a separate suit for damages in case of each ticket sold would involve a multiplicity of suits, excessively burdensome and expensive, and unlikely, in any event, to afford substantial relief to the carrier. It is simply a case of frequently recurring wrong call-

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ing for equitable relief as the only adequate means of protecting the railroad company in the conduct of its legitimate business. So that, for the damages and injuries sustained, if there is no remedy in equity, there is none at all in any just and proper sense. To so conclude would be a sad reflection upon the power of courts, under the law, to protect against wrong where wrong clearly appears, or to afford relief where it is plainly due.

It is contended, because of alleged former connivance by the railroad companies with the defendants in the matter of trafficking in nontransferable tickets, the brokers have been induced to spend large sums of money in fitting up their offices, in securing thereon leases for the future, in the purchase of great numbers of this class of tickets, at a vast outlay of money, and that the railroad companies ought not to be heard in equity to complain of such transactions now. These matters are pleaded at length in the answer and are put in issue by the replication.

To this point it is said in the brief of the defendants:

"Connivance means tacitly permitting or indirectly aiding a thing; as, when one by collusion witholds condemnation or exposure, or when he actually or impliedly lends encouragement to another in the commission of an act. Connivance is not in law a perpetual estoppel. That the railroads for a considerable length of time prior to the bringing of these suits had ceased to connive with the ticket brokers, were it a fact, would permit them to avoid the legal effect of prior connivance and would enable them to bring an action to enjoin an evil custom to which they had formerly lent their encouragement. The doctrine of connivance is, therefore, no perpetual bar. Proof, however, of connivance continued up to the filing of a complaint, or

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shortly prior thereto; must defeat the action. It is a question of proof."

Upon the record before us, this admission practically disposes of the contention of counsel on this proposition. The question of estoppel by connivance is one strictly of fact. We search the evidence in vain for a syllable of testimony from any source, which, upon any theory, can fairly be said to even purport to uphold or support the claim that the plaintiff company, so far as the present situation, or any matter involved in this particular controversy, is concerned, by its conduct, in any way, encouraged the defendants, or connived with them, in their lawful business of trafficking in nontransferable tickets, or the unused portions thereof.

There is nothing in the record to show that the defendants, or any or either of them, have spent a single dollar in maintaining or equipping their offices; or that they have any lease or leases upon their respective places of business, good for the present or future; or that they have on hand railroad tickets of any kind, sort or character at all, nontransferable or otherwise; or that they then had any investment whatever in railroad transportation. Upon all of these matters there is a total lack of evidence. This being so, it would be a waste of time to discuss the question whether the plaintiff company on former occasions, in connection with other ticket contracts, sold tickets to these defendants, for if it did, such conduct could have no application to subsequent and independent transactions, which related solely to the present and future conduct of the defendants, because, as has been well said by the defendants' counsel, "The doctrine of connivance is not a perpetual bar."

The law is that every time one of these defendants dealt in an illegal way in nontransferable tickets, it committed a new and independent wrong against

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the railroad company, distinct and separate from all former transactions. Every time a defendant interfered with a purchaser of a nontransferable ticket in the performance of his contract with the railroad company, a new wrong and injury was committed against that company, for which it has legal ground of complaint. The question, therefore, is, for what wrong does the plaintiff in this case seek redress? Is it for a past, present or anticipated future wrong? If for a present or contemplated future wrong, it is immaterial whether the plaintiff connived at or acquiesced in past wrongful acts of the defendants, even though they may have been of the same general character as those for which redress is now sought.

In this connection counsel seek to apply the maxim that "He who comes into equity must do equity." To show its inapplicability here, and to show that the inequity which bars the plaintiff must have been in connection with the particular act or acts of the defendants against which remedy is sought, we quote the following authorities:

In *John Ainsfield Co. v. Crossman*, 98 Ill. App. 180, at page 186, the court says:

"The maxim of equity that he who seeks equity must come with clean hands, only applies to the particular transaction under consideration by the court.

'The wrong must have been done to the defendant himself, and must have been in regard to the matter in litigation.'"

In *Liverpool, etc., Bo. v. Clune*, 88 Fed. 160, it was held, at page 170, that:

"The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct uncon-

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nected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

In *Woodward v. Woodward*, 41 N. J. Eq. 224, at page 225, the vice-chancellor says:

"The iniquity which deprives a suitor of a right to justice in a court of equity, is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrongful conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

In *Shaver v. Heller & Merz Co.*, 108 Fed. 821, at page 834, the court said:

"The principle 'that he who comes into equity must do so with clean hands' is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there, who has not dealt unjustly in the very transaction concerning which he complains."

In *Kinner et al. v. L. S. & M. S. Ry. Co.*, 69 Ohio St., 339, at page 345, the court said:

"The numerous cases cited in the briefs show that in the application of the maxim urged by counsel for the plaintiffs in error, the courts have consistently granted or refused relief by determining whether the reprehensible conduct of the plaintiff is related to the subject of the suit. In the present case the railway company did not count upon the illegal contract, nor did it, in any manner, ask the court to approve the validity of that contract. The tickets against whose fraudulent use the injunction was granted were issued by the company in the usual course of the business for which it was organized; the stipulations against

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their transfer rested upon the consideration of a reduction of the rates of carriage; they contained no stipulation contrary to any statute either of the United States or of the state of Ohio, or in contravention of public policy, nor was there anything in the conduct of the company by which any right of the original defendants was prejudiced."

The main transactions which the brokers claim to have had with the railroad companies, in connection with nontransferable tickets, were with subordinate employees, not shown to have been specifically authorized to so act, and they occurred for the most part long prior to the commencement of this action. The testimony relating to more recent transactions is to the effect that nontransferable or mileage tickets were purchased by the brokers of certain of the companies in the usual way, at the regular price, and upon compliance with the conditions required of other purchasers of such transportation. Those sales appear to have been made in good faith and to supply *bona fide* customers of the brokers. It does not appear that the defendants were or could have been deceived or misled by these transactions, or in any wise disadvantaged. The evidence shows that the last of these transactions occurred some months previous to the filing of this suit.

Closely akin to the matter just discussed is that of estoppel by laches and acquiescence, also relied upon in defense.

The theory of counsel on this branch of the case seems to be, that because the railroad companies have not earlier attempted to end the evil complained of they are estopped by laches to do so now; that because they have, with such patience as they could summon, permitted themselves to be thus imposed upon and defrauded in the past, therefore they must continue to do so for all time to come; in other words,

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because the defendants have heretofore carried on an illegitimate calling by fraudulent means, without prevention by the companies injured and wronged thereby, that they have therefore acquired a vested or prescriptive right to continue to carry on such unlawful calling by similar fraudulent means, and that the railroad companies, by delay in action, have sinned away their right to ever prevent it. No more completely unsupported and startling doctrine could well be submitted for the consideration of a court of equity.

The very foundation of equitable jurisdiction in a case such as the one at bar lies in the repeated infringement on contracts between the railroad companies and the original purchasers of their nontransferable tickets, and in the fact that the defendants have made a business of aiding and abetting in such infringement and purpose to make a business of doing so in the future.—*Schubach v. McDonald, supra; Syracuse Solar Salt Co. v. Home W. & O. R. Co.*, 22 N. Y. Sup. 321; *Corning v. Troy Factory*, 40 N. Y. 205; *Galway v. M. E. R. Co.*, 128 N. Y. 132; and *Hennesy v. Carmony*, 50 N. J. Eq. 616.

The repeated trespasses of these defendants upon the property right of the railroad companies, to conduct a lawful business in a lawful way, by entering into nontransferable ticket contracts with passengers, is not dissimilar from repeated or continued trespasses upon real estate. The right of the owner of real estate to injunctive relief against such repeated or continuous trespasses is not defeated by any lapse of time, however great, until title by adverse possession under the statute has passed to the defendant. Beach on Injunctions, Secs. 1145-1146.

That the plaintiff railroad companies have a strict legal right which they are trying to protect by these proceedings is settled beyond question. That the defendant ticket brokers have wholly failed to prove

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any facts amounting to an equitable estoppel is equally beyond question. They have neither shown, nor attempted to show, that their course of dealing has been changed by any act of the railroad companies. No facts are established to indicate that they have been misled in the slightest degree; on the contrary, it appears that they have always acted with full knowledge, equal in all respects to that of the companies, and upon full notice. No facts are proven to show that they have been deceived in any way, or induced to alter their position by anything which the railroad companies have done or failed to do. The element of good faith on the part of the brokers is utterly lacking. All of these matters are essential to uphold and support the plea of equitable estoppel. Without them there is no estoppel. The rule is that in order to constitute an estoppel by conduct, all the essential elements of such an estoppel must be present. Bigelow on Estoppel, pp. 431, 437, 492; 1 Story's Equity Jurisprudence, Sec. 191; 2 Story's Equity Jurisprudence, Sec. 543; *People v. Brown et al.*, 57 Ill, 437; *Martin v. Zellerbach*, 38 Cal. 315; *Patterson v. Hitchcock*, 3 Colo. 353; and *Griffith v. Wright*, 6 Colo. 248.

The doctrine endeavored to be relied upon by the brokers is one which can never be made available, except in defense of a legal or equitable right or claim made in good faith, junior in point of time, against which an older right ought not to be heard to assert itself. The doctrine can never be asserted to defend or uphold crime, fraud or misdoing of any character. One reason for this is that under such circumstances the element of good faith is lacking that being absolutely essential when one relies on such plea.

That the fraudulent acts of the brokers in the past have never been done under any claim of right is conclusively shown by the fact that they have always been done clandestinely, under attempts at conceal-

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ment, and by the use of fraudulent methods intended to deceive the railroad companies and their agents. As example of these methods, attention is called to the undisputed evidence regarding the forging of tickets, the use of assumed and fictitious names, the impersonation of the original purchaser of the non-transferable ticket, and the imitation of his signature, and other like practices; all of which demonstrate beyond question not only the fraudulent character of the broker's business, but also a knowledge by them that they are without a vestige of right, upon any theory, because of connivance or acquiescence by the companies or otherwise, to thus violate the express terms of a contract between the railroads and their passengers. Whatever place the doctrine of estoppel by connivance, laches and acquiescence may have in equity jurisprudence generally, relative to injunctive relief, clearly it is inapplicable to the case at bar, where the defendants are shown to have deliberately and knowingly, for a long period of years, engaged in an unlawful business. When they thus knowingly and voluntarily engaged in these illegal transactions it was for the purpose of defrauding the transportation companies, in the expectation and hope of illegitimate gain, and in so doing they acted at their peril. They took every chance of loss and disaster naturally involved in such conduct, and are not in position to invoke the doctrine of equitable estoppel.—*Menendez v. Holt*, 128 U. S. 514; *Galway v. M. E. R. Co., supra; McIntire v. Pryor*, 173 U. S. 38; *Saxlehner v. Eisner & M. Co.*, 179 U. S. 19; *Tracey v. Banker*, 170 Mass. 266; and *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 590.

In *Tracey v. Banker, supra*, Judge Holmes, now a justice of the United States Supreme Court, said:

"The defendant has the boldness to urge that, because he began his attempt to defraud the union in 1894, before the act of 1895 was passed, after having

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been permitted on his application to use the label for a time, therefore the plaintiff's union has no rights under the statute. We do not think the suggestion needs more than a statement: The plaintiff has lost no rights through laches."

In *Galway v. M. E. R. Co., supra,* a leading case upon this subject, the court says:

"Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim.

When the trespass is of such a character that it may be discontinued at the option of the wrong-doer, or, if continued, is susceptible of having legal sanction obtained for its continuance, it seems offensive to our sense of right that a wrong-doer should be permitted to allege that his intention to repeat and continue his own unlawful conduct should deprive the owner of any of the remedies which the law has provided for his protection If it were otherwise the wrong-doer would be permitted to show the aggravated character of his own conduct as a defense to the action of the legal owner and thus violate the rule of law, as well as the plainest principles of equity. * * *

The lapse, therefore, of six years after a trespass has been committed upon real estate, bars not only the legal but also constitutes a practical defense to an equitable action founded upon the necessity of numerous legal actions to obtain redress, because the right to such redress has as to such wrongs expired. But, if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable not only at law but also in equity. * * * *

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The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. * * * The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right, has been uniformly applied in this court. * * * *

Even in cases where laches have been allowed to operate as a defense the question is to be determined in the discretion of the court upon all of the circumstances of the case. * * * *

What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors and condemning them to suffer remediless wrongs."

In *Menendez v. Holt, supra*, the Supreme Court of the United States, speaking through Chief Justice Fuller, says on page 523:

"The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees

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upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder, *Attorney General v. Eastlake,* 11 Hare, 205; nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right. *Fullwood v. Fullwood,* 9 Ch. D. 176. Acquiescence to avail must be such as to create a new right in the defendant. *Rodgers v. Nowill,* 3 De G., M. & G. 614. Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.' Duer, J., *Amoskeag Mfg. Co. v. Spear,* 2 Sandford (N. Y.) 599; *Julian v. Hoosier Drill Co.,* 78 Indiana, 408; *Taylor v. Carpenter,* 3 Story, 458, S. C. 2 Woodb. & Min. 1.

So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

Furthermore, the doctrine of laches only applies to property rights created in the past, and may not be made to apply to other and distinct trespasses in contemplation for the future. As was said by Chief Justice Fuller, in *Menendez v. Holt, supra*:

"Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder."

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The fundamental error in the contention of the defendants upon the question of laches and acquiescence lies in the failure to recognize that each time a broker interfered with one of the nontransferable ticket contracts, he committed a new and distinct wrong against the railroad company, for which a right of action at once accrued. The fact that the railroad company has failed to seek redress for numerous past wrongs clearly may not be urged as a defense against an action seeking relief from an entirely independent and recent wrong, or to an action which seeks protection by injunction against an anticipated future injury.

The cases cited by counsel for the defendants upon the subject of laches go to single distinct acts acquiesced in, where relief against that particular act was denied owing to plaintiff's delay, but such decisions clearly have no application to the present controversy. The doctrine of laches or acquiescence in equity is, in many respects, similar or analagous in its application to the ordinary statute of limitations at law. It will not be seriously contended that because a plaintiff has allowed the statutory limitation period to lapse in a suit upon one cause of action, without pleading and relying upon it, that a defendant could set that fact up as a defense to a suit on another cause of action between the same parties, which had more recently accrued. Such a situation is not unlike the one here presented. That the two causes of action may have grown out of a similar state of facts would in no sense make them identical, or in any way change the rule of law relative to the right of the plaintiff to maintain the action against the plea of estoppel. Each cause is as distinct from the other as it would be if based upon a totally dissimilar state of facts. It seems almost axiomatic to say that the delay which bars the door of equity to a litigant must be delay in

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respect to the precise right which he is then seeking to enforce or protect.

Moreover, as to whether connivance, acquiscence or laches shall affect the issuance of an injunction rests in the sound discretion of the chancellor to whom the application is made, and it is to be determined upon a full consideration of every fact adduced bearing upon that question. In this case the trial judge, upon the proofs, found that issue against the defendants, and clearly the present record presents no ground upon which this court could possibly feel disposed to interfere with or disturb such finding.

That portion of section 25a, subdivision of and amendment to section 25, of the Code of Civil Procedure, upon the provisions of which the defendants relied for a change of venue, reads:

"All actions affecting property, franchises or utilities, whether by foreclosures, appointment of receivers, or otherwise, shall be tried in the county where such property, franchise or utility is situated, or in the county where the greater part thereof is situated."

Section 27 of the Code of Civil Procedure provides in part:

"In all other cases the actions shall be tried in the county in which the defendants, or any of them may reside at the commencement of the action."

Separate like motions to change the venue, each supported by a proper affidavit, were filed by two of the defendants, under subdivision 25a above quoted. The material part of each motion follows:

"That the said action affects property, to-wit, the ownership of certain alleged nontransferable railroad tickets issued and to be issued by the plaintiff herein, and that the greater part of said property or railroad tickets already issued now are and at the time of the bringing of said actions were situated in the said City and County of Denver, and were held in the possession,

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custody and control of brokers, defendants herein, resident in the City and County of Denver, and not in the said City of Pueblo."

It will be observed that this motion is based solely upon subdivision 25a, and unless it affords grounds for a change of venue of an action like this the cause was properly retained in Pueblo county.

Section 25 and subdivision 25a thereof have reference exclusively to actions *in rem*, where specific property is to be directly affected. This action is distinctively an action *in personam*, and is transitory in its character. In concluding what provision of the code governs the venue of this action it is necessary first to consider and determine its nature and purpose. What is the character of the suit, and what is its object? It is strictly a suit in equity to protect, by injunction, the property right of the defendant company to do a lawful business in a particular way; such is its only purpose; nothing more, nothing less. It is not sought to affect or obtain relief against specific property. The decree operates against the defendants *in personam*. It simply restrains them from continuing to do certain unlawful acts, the doing of which wrongfully interferes with and hinders the plaintiff in carrying on, in a perfectly proper and legitimate way, its lawful business of issuing and dealing in nontransferable signature tickets; such is the prayer of the complaint and such is the relief given. It is in no sense an action upon the tickets, either for their recovery or for damage resulting to the company for an unlawful traffic in them. The thing affected is a property or business right of the lightest possible value to plaintiff, which is as much entitled to protection as any other species of property, real or personal. This being so, it follows irresistibly that the venue of this suit is in no way controlled by subdivision 25a of the Civil Code, but by section 27 thereof.

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Railroad Company v. McConnel, supra, was in all respects a case like this, based upon similar facts and having the same purpose in view. The decision there is conclusive upon the question as to what is involved in this class of cases. We quote from the opinion to this point as follows:

"The question, as fairly presented in these bills, is that of the protection of the business of the complainants being carried on during this Exposition in aid thereof, and in the form of these Exposition tickets. The wrong of which the complainants are complaining is not limited to the proposition that any particular one or more of these tickets has been violated, giving rise thereby to legal liability. The position here is that the business of the complainants is being seriously damaged, and will continue to be during the perior of this Exposition. The loss, it is alleged, is being suffered by these complainants by repeated and continued purchases and use by these defendants of these tickets, and the question involves the entire loss which the complainants may sustain by the fraudulent use of such tickets from the beginning to the end of the Exposition. It is the protection of the whole of this form of business from the entire loss already sustained, and likely to be sustained between now and the end of the Exposition period. I repeat that it is not a question of enforcing a contract, or of recovery of damages for a breach, but it is protection of the business of the complainants from loss suffered and to be suffered by the frauds committed and likely to be committed against these companies by means of, and through the instrumentality of, these void tickets, and it is in these broader limits that the question is here considered. * * * *

The contention is that these bills are substantially suits upon the ticket contracts, to recover damages for a violation thereof, or for specific execution

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thereof. * * * From what has been said, it will readily be seen that in my opinion these are in no just sense suits upon the contract, nor for specific performance, but are suits to protect the business of the complainants against the irreparable mischief being suffered by reason of the fraudulent use and abuse of these ticket contracts. * * * Plaintiffs' business is the subject-matter in each bill, and the right claimed is exactly the same against all the defendants. The injury complained of is the same, and is being inflicted by defendants in the same method and at the same time. * * * *

The case simply calls for an application of the injunctive process to prevent complainants' business from fraud and obstruction, and a business is just as much the subject of suit, with a right to protection, as ordinary forms of tangible real and personal property. Whatever doubt may have been expressed at any time, the cases are now agreed upon this proposition. It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as a right in the ordinary forms of property. * * * *.

It is sufficient to repeat what has already been said, to-wit, that these are suits to protect the plaintiffs' business, and in no sense suits upon these ticket contracts, to enforce the same, or to recover damages for breach thereof. These suits are to restrain these defendants from the continued and repeated use of these contracts as instruments and means whereby to

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commit frauds upon complainants' business. They are not suits between the parties to these contracts, but against third parties, to restrain the fraudulent use of the contracts as means of committing such wrong."

The tickets referred to are not the subject of the suit; they are merely incidental, and are material only as being the means and instruments by which the unlawful and malicious interference of the defendants is made effective. It is too plain to need further discussion that the property affected by the present action was and is the property right of the plaintiff company and the other railroad companies to carry on their lawful business by issuing and selling nontransferable tickets at reduced rates, without unlawful and wrongful interference by the defendant brokers.

But if the position assumed as to the object of the suit is incorrect, still railroad tickets do not have the characteristics of property as that term is used in subdivision 25a of the code. At most a railroad ticket is mere evidence of a contract. By the great weight of authority, where the exact character of a railroad ticket is discriminately considered and exactly defined, it is held that it does not even rise to the dignity of the evidence of a contract, but is a mere token to show that the person properly in possession of it has paid his fare between the stations named in the ticket.

In 4 *Elliott on Railroads*, Sec. 1593, it is said:

"According to the generally accepted doctrine a ticket, in the ordinary form, is a voucher, token or receipt, rather than a contract, adopted for convenience, to show that a passenger has paid his fare from the place or station named therein as the place of departure to the place or station named therein as the place of destination. Fare is 'the price of passage or the sum paid or to be paid for carrying the passenger'. A ticket is evidence of a contract to carry and

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the right to passage, but the contract itself is implied by law except in so far as it is expressed in the ticket. * * * A railroad ticket is not negotiable as commercial paper, although it may be transferable unless otherwise provided, and a person who purchases a ticket in good faith and for a valuable consideration from one who has stolen or fraudulently obtained it from the company does not thereby acquire a good title."

In *Quimby v. Vanderbilt*, 17 N. Y. 306, at page 313, the court, speaking of railroad tickets, said:

"The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage money; and their office is to serve as token to enable the persons having charge of the vessels and carriages of the companies to recognize the bearers as parties who were entitled to be received on board."

In *People v. Warden*, 157 N. Y. 116, at page 146, Judge Martin said:

"A ticket is a mere incident to the business of the companies in transporting passengers. Like a baggage check, it is merely a method adopted by them for the transaction of their own business. The ticket itself possesses none of the ordinary elements of property and cannot, without the consent of the companies, form the basis of a legitimate independent business. At most it is but an evidenec of the arrangement between the companies and their passengers in which others have no lawful interest. No right to transfer is given, and, generally, none is intended."

While this is from a dissenting opinion, there was no division in the court on this particular point.

In *Jannin v. State, supra*, the Texas court said:

"The ticket of a railroad company is not property in the general acceptation of the term, but the pur-

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chaser has only a special property in the ticket as evidencing his right to passage on the road."

In *Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 455, at page 466, it is said:

"The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger to be held by him, temporarily, for a special purpose, and who, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: it is evidence in the passenger's hands that he has paid his fare and has a right within the cars; it insures the payment of the passage money by all who take seats, and when it is redelivered to the company it becomes a voucher in its hands, against the officer or agent who issued it, in the adjustment of its accounts."

In *Levinson v. Texas & N. O. Ry. Co.*, 43 S. W. 1032, (Texas), a case in which a nontransferable ticket had, after passing through broker's hands, come into plaintiff's hands, in a suit for conversion, the court said:

"By reason of its very terms, it (the ticket) had, upon being transferred, ceased to be property, was void and subject to be taken up; consequently plaintiffs, as holders of such ticket, had no rights in respect thereto, and cannot be allowed damages from defendant for taking it up and retaining it."

Moreover, it clearly appears that the original purchaser of these tickets took them subject to express agreements and limitations, and that no power to dispose of or transfer them existed. This right being wanting, the tickets, in the hands of third persons, lacked one of the essentials of the right of property, namely, the power of sale and transfer, and therefore, in no event, could they be property in the hands of

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such holders. *Jannin v. State, supra;* and *Schubach v. McDonald, supra.* In the hands of the defendants these tickets are merely evidence of contracts between the railroad company and third persons, in which the defendants have no possible interest or property right. Not a single ticket in their possession has any legal value; on the contrary, they are void in the hands of any third person. The property right of the defendants in such tickets is precisely of the character of the property right which one acquires in counterfeit money, purchased for a nominal sum with a view of passing it as true and genuine. The tickets have no more the essential elements of property in the hands of a third person than that kind of currency would have.

Furthermore, it appears from the record that the complaint was filed September 7th, 1905; that on the 11th of that month the defendants entered a general appearance and filed their answer to the merits upon the order to show cause; and that the same was then fully argued, submitted to the court and taken under advisement. Not until afterward and on the 18th of that month was the motion to change the venue filed. The answers of the 11th day of the month went fully into the merits of the controversy. No intimation was then given that defendants would apply for a change of venue.

The right to have the place of trial changed because the action is brought in an improper county is not jurisdictional, but a mere personal privilege, which may be waived, and is waived, by a general appearance and pleading to the merits. It is also waived unless the motion is interposed at the earliest possible moment. Such a motion must be made as soon as the moving party acquires knowledge of the facts upon which the motion is based. It is manifest that this knowledge came to the moving party in this case as

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soon as the complaint was served. We are clearly of the opinion that the motion to change the venue came too late.—*Denver S. P. & P. R. R. Co. v. Roberts*, 6 Colo. 333; *School District v. Waters*, 20 Colo. App. 106; *Fletcher v. Stowell*, 17 Colo. 94; *Commissioners v. Commissioners*, 2 Colo. App. 412; *Wasson v. Hoffman*, 4 Colo. App. 491; *D. & R. G. R. R. Co. v. Cahill*, 8 Colo. App. 158; *Forbes v. Commissioners*, 23 Colo. 344; *Boyle v. People*, 4 Colo. 176; *Roberts v. People*, 9 Colo. 452; *Bean v. Gregg*, 7 Colo. 499; *Smith v. Morrill*, 12 Colo. App. 233; and *Burton v. Graham*, 38 Colo. 199.

In *School District v. Waters, supra*, it was said:

"'It may be stated as a general rule that the bringing of an action in an improper county is not a jurisdictional defect, where the court has general jurisdiction of the subject-matter, and that the statutes fixing the venue in certain actions confer a mere personal privilege, which may be waived by a failure to claim it in the proper manner and at the proper time.'" (Citing 22 Enc. P. & P. 815 and cases cited.)

Upon the plea that the plaintiff company, because of its failure to pay the state license tax, as provided for by the statute of 1902, ought not to be permitted to maintain this action, it is sufficient to say that since the decision by the court below in this case the Supreme Court of the United States, in *American S. & R. Co. v. State of Colorado, ex rel. Lindsley*, reported in 204 U. S. 103, has held that law void, so far as it relates to a foreign corporation which had already paid the entrance tax and received permission to do business in this state, on the same basis of restrictions and liabilities as domestic corporations, and therefore this plea was not and is not available to defendants as against the plaintiff, a corporation organized under the laws of the state of Utah, which had thus complied with all of the requirements of the then exisiting laws of Colorado, entitling it to those privileges.

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In support of the proposition that the court below erred in issuing the temporary restraining order without notice, and in failing to dismiss the complaint upon the ground that no emergency existed, the defense relied upon the code provision of the Session Laws of 1903, as follows:

"That if complainant shall file an affidavit by himself or his representative and by not less than two other persons, showing that irreparable mischief or injury will result to him, if notice be given, and the complainant shall, further, make affidavit (1) that such alleged emergency is not the result of his creation or connivance, and (2) that his application is made at the earliest time that he could have made it, after learning of the facts, the court or judge shall have power to grant a temporary restraining order."

That particular provision for the dismissal of the action, in case the showing called for by the foregoing was insufficient, reads thus:

"That in the event the temporary restraining order shall issue without notice and it shall afterwards appear to the court, upon any hearing or trial of said matter, that the emergency alleged therefor did not exist, or, existing, was brought about by the act or omission of or for the plaintiff, or by his knowledge, the court shall find and enter judgment accordingly, and shall, also, dismiss the complaint without respect to the merits thereof, and shall, also, summarily enter judgment on said emergency bond for the defendant and against the plaintiff and his sureties aforesaid, and issue execution therefor."

The record fails to show that the court was requested to rule upon these matters. No motion to dismiss was interposed; neither was judgment moved on the emergency bond. So that, upon these propositions, the court was not requested to act, and it would be a

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gross injustice to permit the defendants to now avail themselves of any alleged error in these respects.

Moreover, the questions as to whether such emergency did exist and whether it was brought about by the connivance of the plaintiff, are ones of fact, and must of necessity have been determined, upon the whole record, adversely to the defendants, as the statutory emergency contemplated was fully shown by explicit direct affidavits as required by statute. From these it appears that irreparable mischief or injury would result to the plaintiff if notice were given, because great delay would thereby be involved, as the defendants, residing in different cities of the state, could not be readily reached, and while such notice was being served they would continue to commit the acts complained of and would, as had been done under similar circumstances in like cases, assign their business to others, not parties to the suit, and would dispose of the tickets acquired by them to third persons, many of them beyond the jurisdiction of the court. The affidavits further expressly show that the emergency was not the result of plaintiff's connivance. No attempt was made to controvert the showing on these propositions. There was, therefore, no error upon these supposed grounds, and even if there had been, the defendants not having urged these matters in the court below are not in position here and now for the first time to complain of them.

It is to be carefully kept in mind that so far as the defendant brokers carry on a legitimate business, they are not and cannot be affected by this decree at all. It is not intended to affect their lawful dealings. But so far as they have carried on, and seek to carry on, a business in these special contract tickets, it is an illegitimate and improper business and ought to be stopped. It is fraud, not only upon the railroad companies, but upon the traveling public as

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well. If the railroad companies are permitted to carry on their rightful business in these special contract tickets, without wrongful interference and malicious molestation by the brokers, the result will be to greatly benefit the traveling public; these reduced-rate tickets will then doubtless be issued more frequently than they now are, probably at better rates, and certainly with many less limitations and annoying requirements.

Perceiving no error in the record, the judgment is in all respects affirmed.

Judgment affirmed.

Decision *en banc.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE WHITE not participating.

[No. 6454.]

THE WELDON VALLEY DITCH CO. ET ALS., V. THE FARMERS PAWNEE CANAL CO.

1. WATER RIGHTS—*Adjudication of Priorities*—The owner of a ditch, in order to be entitled to a decree settling its priority must show its construction, a diversion of water from the stream, the carriage of the water through the ditch, and a beneficial application of the water to the land—(547).

2. ——*Application to Beneficial Uses*—The test of beneficial use of water for irrigation, and the extent of such use, is not the area irrigated in each year—(549).

The irrigation of a newly settled farm in the public domain is a continuing process, requiring a number of years. The settler may excavate his ditch or purchase a water right, in anticipation of what will be required to irrigate the whole of his plantation, and so apply and use the water that when the right has ripened he will have sufficient to irrigate the whole—(549).

But no beneficial use can be made of a larger volume than is necessary to irrigate the land to which it is applied—(550).

3. ——*Bill to Settle Appropriation of Ditches in Different Water Districts.*

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In a proceeding to establish and settle the relative priorities and amounts of appropriations between ditches in different water districts, the amount decreed to one of the ditches held excessive—(551).

4. PRACTICE IN THE SUPREME COURT—*Questions Not Presented Below*—When the parties agree in the court below as to the propriety of the form of action, and the theory of the cause, they are bound thereby in the court of review—(547).

5. EVIDENCE—*Judicial Notice*—It seems that the court will judicially notice the volume of water necessary to irrigate eighty acres of land; and that forty-seven cubic feet of water per second of time, is not required for the irrigation of six hundred and forty acres—(550).

Error to Logan District Court—Hon. E. E. ARMOUR, Judge.

Mr. H. N. HAYNES, for plaintiffs in error.

Messrs. ALLEN & WEBSTER, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

This case involves the same general subject and object of litigation as *Johnson v. Sterling Co.*, 49 Colo. 482; namely, to settle the relative priorities and amounts of appropriations of ditches in different water districts of the South Platte river. District 1, comprises that portion of the stream from the mouth of the Cache la Poudre river, to the west boundary of Washington county; district 64, the remainder of the stream from the west line of Washington county to the east line of the state. The priorities of all the ditches in these two water districts were settled by statutory decrees, and each district had its own independent adjudication decree long before the bringing of this suit. Logan county was settled prior to Morgan, and the ditches in district 64, for convenience called the Sterling ditches, generally speaking, are senior in priority to the ditches in district 1, for convenience

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called the Fort Morgan ditches. Plaintiff is a Sterling ditch, and defendants in the main, are Fort Morgan ditches. The ground of complaint is, that ignoring the seniority of plaintiff's canal in district 64, defendants in district 1, in times of scarcity, take all the water, and prevent it flowing to plaintiff's ditch. It is treated as an appropriate proceeding in the nature of a bill of peace in equity, to quiet plaintiff's title, to adjudicate its priority as against defendants' priorities, and establish and settle the relative priorities between ditches in the different water districts. The right to maintain the action is conceded and both sides prayed for similar relief. Indeed, defendants say they were about to commence an action, but plaintiff forstalled them by instituting this proceeding. The decree settles the priorities of the ditches and commands the water commissioners of districts 64 and 1, to distribute the water in accordance with its terms. Defendants complain that excessive amounts were awarded to the Pawnee ditch, and this is the only question we will consider. All that was said in *Johnson v. Sterling Co.*, relative to the parties selecting the action and agreeing on the theory of the case, applies equally well here. It is not an action to change a settled priority on the ground of subsequent abandonment. It is a proceeding to settle the priorities of ditches in different water districts. A ditch owner to be entitled to a decree settling its priority for irrigation, must show its construction, a diversion of water from the stream, carriage through the ditch, and a beneficial application of the water to the land. The court then settles the water right belonging to the ditch, by a decree establishing the date and volume of its appropriation. In this case it fixed the first appropriation of the Pawnee ditch at 47 cubic feet per second, date or priority, September 17, 1873; and

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the second appropriation at 150 cubic feet per second, priority dating June 22, 1882.

The canal was originally called the Buffalo ditch. The Buffalo Townsite Company constructed it about a mile and a half or two miles from the river, to the old grade of The Colorado Central Railway Company. The original plan, which was abandoned, was to build a ditch about fifteen miles long, to irrigate some 5,000 acres. Commencing June 22, 1882, the ditch was built or enlarged, and extended about 25 miles, by The Pawnee Ditch and Improvement Company, which constructed it in part along, over and through the ditch, route and right of way of the Buffalo ditch, to cover some 30,000 acres of land, and named the Pawnee ditch.

In 1873 or '74, four settlers each made entry to 160 acres of government land, at or near the end of the Buffalo ditch, and constructed extensions or laterals from it to irrigate their tracts. The water was beneficially applied on no other lands; these were all the lands they owned under the ditch; and they were all the land owners and users of water from the canal until after the construction of the Pawnee ditch, June 22, 1882. This beneficial use of the water by them upon these four places from 1874 to 1882, is, or should be the basis of the first appropriation of 47 cubic feet per second; and the construction of the Pawnee ditch in 1882, and the subsequent use of the water down to the time the ditch was turned over to plaintiff, is, or should be the basis of the second appropriation of 150 second feet.

Up to 1882, these settlers had not cultivated and irrigated the whole of their tracts. Defendants contend the highest aggregate number of acres irrigated by them any year during this time, should be the basis of the first appropriation of the ditch. This undoubtedly should be considered, but it does not de-

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termine the matter in this case. It is impracticable, if not impossible, for a settler to seed and irrigate 160 acres of sod breaking a year. Settlers on the public domain are usually poor men, and cannot do this all at once, even if it were possible. It is a continuing process requiring a number of years. A private ditch is constructed or a water right acquired in a ditch by a land owner, with a view to obtaining sufficient water to irrigate his whole farm; but one settling on 160 acres of raw land, would not think of buying enough water to irrigate that amount of sod breaking a year.

In this case, each settler could beneficially use such an amount of water that when the right ripened, he would have sufficient to irrigate all his land. He could build his ditch, or buy his water right in anticipation of this amount, and it would be a beneficial use of the water to apply it on any portion of the land needing it. The test is not necessarily the number of acres irrigated each year. If these tracts were farmed, and all the water necessary to irrigate them was beneficially used with reasonable diligence in the improvement of the land, it is sufficient. What was a sufficient amount of water, and was it applied to a beneficial use, is the test.

The owners of the Pawnee ditch sold eighty acre water rights of 1.44 cubic feet per second, for the irrigation of the land under the ditch, and the water was accordingly divided among the consumers on that basis and applied to the lands. It is the basis of the second appropriation. Its sufficiency is not questioned. If 1.44 cubic feet per second is sufficient to irrigate 80 acres under the Pawnee ditch, it is some evidence of the amount needed for the irrigation of these lands. This is the basis upon which water rights were procured for, and applied to the land under the ditches generally, in northern Colorado, and subsequent use

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and experience, has demonstrated that that amount is ample.

The court apparently based the first appropriation upon the amount of water carried through the canal, and not the amount necessary for the irrigation of the land, applied to a beneficial use. The complaint, on the same line, ingenuously alleges that the ditch was originally constructed twelve feet wide on the bottom, with a capacity of 100 cubic feet per second, and capable of irrigating 5,000 acres of land. Admitting all this, the ditch might not be entitled to any decree. We have endeavored to show these settlers could not make a beneficial use of more water on the tracts than was necessary for their irrigation. It is immaterial whether the Buffalo ditch was ten, twelve, or fifteen feet wide on the bottom, or whether it was capable of irrigating 5,000 acres of land and was filled to its capacity. Anyone familiar with irrigation, knows that 47 cubic feet of water per second is not necessary for the irrigation of 640 acres of land. That amount, therefore, was not beneficially applied thereto.

There is evidence that the loss in distribution from seepage and evaporation will be of no consequence, while some of the witnesses put it as high as twenty-five per cent. Allowing the ditch 11.52 cubic feet per second, as the necessary amount, beneficially used, for the irrigation of the land, and adding to this, twenty-five per cent for the loss in carriage, the first appropriation of the ditch should be 14.40 instead of 47 cubic feet per second.

2. The second appropriation is based on the use made by holders of eighty acre water rights, from 1882 until the ditch was taken over by the plaintiff in 1898. During this time the ditch was operated by the owners, who sold and distributed the water in rights of 1.44 cubic feet per second for the irrigation of an eighty acre tract. During the time mentioned, only 70 of

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these rights were sold and used on the lands. The land owners and water right holders, could only beneficially apply to the land the necessary amount of water in this case, represented by these contracts. The use of the aggregate water rights made by them upon the land, constitutes the second appropriation of the ditch. Counsel for defendants contends they did not at any time receive and use this amount of water. The evidence upon this point is conflicting. The court, however, awarded 150 feet, which is clearly excessive. Seventy eighty acre water rights of 1.44 cubic feet, make 100.8 cubic feet, add to this the twenty-five per cent for loss in carriage, and the result, 126 cubic feet, is the proper amount. The case is reversed and remanded with directions to the district court to amend its former decree or enter a new one, establishing the first and second appropriations of the Pawnee ditch in accordance with this opinion. No other changes will be made, and each party will pay their own costs. *Reversed.*

Mr. JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

[No. 6472.]

JACKSON V. THE YAK MINING, MILLING & TUNNEL CO.

1. MASTER AND SERVANT—*Duty of Master as to Place of Work*—One operating a lode mine must use reasonable care to see that the lagging upon which the miner may be required to walk, in going about the mine, is in safe condition. He is liable in damages for injuries to an employe occasioned by any defect in the material or construction thereof which might have been avoided by the exercise of ordinary care. The facts examined and the case held not to be within the exception which controls where the servant is employed to make a dangerous place safe—(557, 558).

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2. ——*Vice Principal*—Knowledge on the part of the agent who timbers the mine, is the knowledge of the mine owner. If defective or unsuitable timber is used, and by reason of this defect an injury afterwards occurs to a miner, the master is not exonerated by the claim that at the time of the injury he had no knowledge of the condition of the structure—(557, 558).

3. ——*Non-Delegable Duties of Master*—The obligation of the master to use reasonable care in respect of the appliances furnished for the use of the servant cannot be delegated, so as to absolve the master from responsibility for negligence in this regard—(561).

4. ——*Servant's Assumption of Risk*—The servant does not assume extraordinary risks occasioned by the master's negligence, unless the danger is an open and visible one, or the servant has knowledge of it—(561).

5. ——*Contributory Negligence of Servant*—A timber man employed in a lode mine, having occasion in the discharge of his duties to walk upon the lagging of a drift is entitled to assume that it was constructed of proper material and in a proper manner—(559).

At the most, he is not required to do more than to examine the surface, restore any of the sticks which may be out of place and use reasonable care in making the passage—(560).

6. NEGLIGENCE—*For the Jury*—Only when the facts are undisputed, and reasonable men can fairly draw but one conclusion is the question of negligence one of law for the court. The facts examined and the case held within the general rule—(558).

Error to Lake District Court—Hon. CHARLES CAVENDER, Judge.

Mr. J. J. MCFEELEY and Messrs. DIXON & DIXON for plaintiff in error.

Mr. WILLIAM E. HUTTON, Mr. JOHN A. EWING and Mr. B. B. MCCAY for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

Action for damages upon account of personal injuries. At the close of plaintiff's case the defendant

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upon motion was granted a non-suit; the plaintiff brings the case here for review upon error.

The rule of law relied upon to reverse the judgment is the rule which requires the master to furnish for his servant a reasonably safe place in which to work. The main contention is in the application of the rule to the facts, rather than over the rule itself.

For about two years prior to the accident the plaintiff had been in the employ of the defendant company as a laborer, engaged in mucking, shoveling and helping on machines. About two weeks prior to the accident he was changed to what is known as a timberman, and as such was engaged in the defendant's mine in what is called stope No. 11, drift "K". This drift was timbered with what are known in mining parlance as "square sets". These are frames so constructed and so arranged with reference to each other so that the tops can be and are covered with what are known as cribsticks or lagging. The square sets follow each other, so the cribsticks thereon form a continuous floor or gangway to be used by the employees in going to and from their work. These cribsticks appear to have been about five feet in length, about two inches in thickness, of various widths, mostly unedged. They rested upon timbers called caps, which were about seven feet in length, about twelve inches in depth and ten inches in width. The plan of this structure was for the cribsticks at the ends to be butted up against each other, not lapped. This gave each cribstick or board a bearing at the ends of five inches with which to lay upon the tops of the caps, which were ten inches in width. The cribstick boards were not nailed down; it was necessary at times to remove them in order to allow the ore, dirt, rock and rubbish to drop through, and then replace them. They were intended to be secured by wedges driven between the edges of the outside crib-

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sticks and the posts at the corners of the square set. These wedges could not be driven tightly because the cribsticks being unedged, such driving would cause them to 'buckle up' as it is termed. The heighth of each square set appears to have been about seven feet. In the operation of this mine it appears that when a drift was stoped out so as to render it necessary, a second set of square sets was constructed upon the first and a third on the second, etc. In the drift involved three sets or tiers of square sets had been erected all along prior to the accident so that the top floor or gangway was twenty-one feet from the ground. The evidence does not disclose how long this timbering had been done by the defendant company before plaintiff was employed as timberman and set to work in this drift, but it does disclose that it had been there for some time prior to his employment as timberman, and that the plaintiff had nothing to do with its construction. It was likewise erected as and for a permanent structure; that is so far as such structures are permanent consistent with the operation of a mine. It was constructed as a permanent structure for the purposes intended so long as such a structure was needed there for that purpose, evidently depending upon the length of time the mine would be operated, at least in that drift.

The plaintiff testified that at about 7 o'clock in the morning on the day of the accident he was working in stope 11; that in order to get to it he had to go through a drift and walk on the flooring made of cribsticks on top of the square sets (crossing over four or five of such sets), then turned and went to the stope where the men were working, which was four or five feet from the timbers where the accident occurred; that when he turned to go back he looked at the floor, and it looked all right; that he had a candle in his right hand and an ax in the left; that when

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he stepped upon some of the cribsticks in a certain section the cribbing slipped beneath him and went down; that he endeavored to save himself by seizing other cribsticks, but they fell with him and he was precipitated a distance of twenty-one feet, sustaining injuries of a very serious and permanent character. The plaintiff testified, that after the accident he learned for the first time (and other evidence also discloses) that one of the caps on the square set through which he had fallen was defective. From its description the inference is that it was sawed from a log insufficient in size to furnish a cap with the same dimensions throughout, but for a distance of two feet or more from one end it was smaller in size and was not of the heighth of twelve inches or the width of ten, but smaller than this dimension and was rounding instead of square on the side in and towards the square set in which the plaintiff fell, and in which place it appears that the cribsticks on which he had attempted to walk slipped therefrom. The plaintiff testified, that when he came to the cribsticks on the square set through which he fell, he examined the floor carefully, as he did all others; that the set was entirely covered with cribsticks and that they were in proper position, the ends coming to the center of the caps; that he could tell this by their position relative to the posts; that his principal duty was that of doing timber work where the men were working in the stope, although he also testified that if he found a cribstick board broken it would probably have been his duty to have replaced it.

The shift-boss testified that neither the timberman nor the miners had anything to do with laying the flooring upon the caps except upon his order. Mr. Hoagland, a witness for the plaintiff, testified that he was employed by the defendant as an all around man; that three days before the accident the shift-

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boss ordered him to go to the particular square set in question to clean the dirt off of the floor; that on taking up the cribsticks he discovered the defective cap as above described; that after cleaning off the dirt he replaced the cribsticks as he found them, except that at one point they would not lie level because a knot had not been trimmed close enough; that he procured an ax and trimmed the knot off; that he replaced the cribsticks carefully, as he found them, side by side, and wedged them in the usual manner; that when the cribsticks were down one could not see the condition of the cap underneath; that owing to the condition of the cap they should have been fastened.

Under this state of facts the plaintiff's contention is that the accident was caused on account of the cribsticks slipping from the end of the cap, which was round on that side, and which was an unsuitable, unsafe and unfit timber for that purpose, viz., for the purposes intended, in the manner intended; that the defendant was negligent in the use of this timber in the building of the square set.

The defendant presents four theories upon which it contends that the findings of the trial court can be sustained. First, that the evidence fails to show that the defendant was guilty of negligence as charged. Second, that the evidence fails to show that the act of the defendant in the original use of the cap of which plaintiff complains, was the proximate cause of the injury. Third, if otherwise, that plaintiff, having engaged himself to the defendant as a timberman, was charged with the responsibility for the condition of the timbers and cribsticks, the proper placement and wedging of the sticks, the duty of inspecting it all, and ascertaining whether it was or was not in a safe condition; that if there was negligence in failing to discover a dangerous condition of the place

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where he was injured, that negligence must be attributed to him. Fourth, that the plaintiff assumed the risk.

We cannot agree with either of these positions. Such structures used in mining operations come within the safe place rule, unless for some other reason which makes an exception. The rule is that a mine owner is liable in damages for injuries to his employees occasioned by any defect in the material or insufficiency in the construction of such a structure which could have been avoided by the exercise of ordinary care.—*Grant v. Varney*, 21 Colo., 329; *Cripple Creek Mining Co. v. Brabant*, 37 Colo., 423; *Garity v. Mining Co.*, 27 Utah, 534; *Western C. & M. Co. v. Ingraham*, 70 Fed., 219; *Westland v. Gold Coin Mines Co.*, 101 Fed., 59; *Kelley v. Fourth of July Mining Co.*, 16 Mont., 484; *Hanley v. California etc. Co.*, 127 Calif., 232.

In *Grant v. Varney, supra*, this court held that it was the duty of the master to furnish and maintain a reasonably safe place for the servant to work in; that if he delegates the performance of this duty to an agent who is negligent in furnishing or maintaining such a safe place and if in working therein and without fault on his part an injury occurs to another employee, such negligence is the negligence of the master.

In *D. & R. G. R. R. Co. v. Sipes*, 26 Colo., 17, we held, that it was the duty of the employer to make reasonable efforts to keep machinery and appliances used by its employees in suitable condition for use; that this duty cannot be delegated so as to exonerate the employer from liability to an employee injured by the negligence of a co-employee charged with the performance of such duty in failing to do so, but that the employee charged with such duty is a representative of the employer in the performance thereof and not a fellow-servant; that his negligence therein is the

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negligence of the employer and if the negligence of the master in this respect is the proximate cause of an injury, he is not relieved from responsibility because the negligence of a co-employee contributes to the injury.

In Vol. 26, page 1144 Cyc., it is said:

"Where the defect in an appliance is shown to be structural and is of such a character as renders it unsafe it may be inferred that the employer was aware of the defect and an employee who has been injured by such an appliance need not show that the master knew that it was defective. * * * *"

Cases from Arkansas, Illinois, Indiana, Kansas, Massachusetts, Michigan, Pennsylvania, the Federal courts and England are cited in support of this statement.

Applying these principles to the case at bar, in the original construction of this frame work, the knowledge of the then agent of the master that this cap was not suitable was the knowledge of the master, and if there was negligence in the original construction, and upon account of this negligence the injury occurred, the master cannot escape liability by claiming that at the time of the injury he had no knowledge of the condition of this structure. The fault, if any in this case, as shown by the evidence, was in the use of the material supplied in the first instance. The question of whether the master was negligent in this respect was for the jury to determine. It is only when the facts are undisputed and are such that reasonable men can fairly draw but one conclusion, that the question of negligence is ever considered one of law for the court.—*Hines Lumber Co. v. Ligas*, 172 Ill., 315.

We do not think this case, as it comes to us, is one where all reasonable men must draw the inference that the plaintiff was guilty of, or the defendant free from, negligence. These were questions of fact on

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which there was evidence which should have gone to the jury.

The contention of counsel that the cribsticks that fell with the plaintiff evidently had been displaced since the preceding day, for the reason that they did not fall with him on the day before and appeared then to be all right; and for the further reason that they had been firmly tapped down and wedged by Hoagland three or four days before the accident and for these reasons the defective timber could not have been the proximate cause of the injury, are but arguments only to sustain their theory of the evidence. On the other hand, there is no evidence showing that the plaintiff stepped upon the same cribsticks upon the preceding day, or that the wedges would have held them at any time when the weight was placed directly upon those at the place where the timber was round and not flat, as the evidence shows it should have been in the manner used. The evidence, as it stands, tends to show that it was not upon account of the fact that there had been recent displacement of the cribsticks and loosening or displacement of the wedges that caused this injury, but that it was upon account of the condition of the cap itself. According to the testimony of the plaintiff's witnesses, the cap was unsuitable for the purposes intended, and this is not in any way mitigated against, because there is evidence to the effect that the cribsticks on the adjoining set nearer the breast where the shooting was done were pushed over farther than they should have been.

The testimony of the plaintiff is to the effect that he examined the cribsticks upon this square before stepping upon it, and that they all appeared to be in their proper position. It was not his duty, and he never was instructed, to investigate the timbers underneath, or any of them for the purposes of ascertaining if there had been any unsuitable or defective

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timbers used in the original construction. He had a right to assume that in the original construction of this frame work the master had caused it to be supplied with proper timbers placed there in a proper manner, and his duties, at most, were to examine the surface to ascertain if the cribsticks were in proper place, and if not to so place them for the purpose of making the surface reasonably safe for him and the other employees to walk over, and likewise to use reasonable diligence in going over it.

In the case of *Westland v. Gold Coin Mines Company*, 101 Fed., page 59, it was held, that a mining company is bound to exercise reasonable care in the erection of such structures to see that the timbers are of adequate strength and number and securely fastened to render it a safe place in which to work. To the same effect is the case of *Western C. & M. Co. v. Ingraham*, 70 Fed., 219, and many other cases there cited in support of this position.

In the case of *Hanley v. California etc. Co.*, 127 Calif., 232, it was held, that where a permanent tunnel is driven into a mountain to open up veins of mineral that as fast as it is completed the finished tunnel becomes an appliance or means furnished by the master through which the remaining work is to be prosecuted; that the laborer employed upon the unfinished portion of such a tunnel does not take a fellow-servant's risk in passing through the finished portion to get to his place of employment; that this rule would not be different where he himself helped to complete the finished portion. The same principle is involved in *Union Pacific Ry. Co. v. Jarvi*, 53 Fed., 65, and *Kelley v. Fourth of July Mining Co.*, 16 Mont., 484, and we think is applicable here.

It is true the plaintiff might, by a minute inspection of the entire structure, have ascertained that the dimension timber upon which the boards rested

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was round at the one end and for that reason unsafe for the purposes intended, in the manner planned, viz., to place the plank thereon butted up against the ends of each other and not lapped, but there is no evidence which goes to show that under the circumstances it was his duty to do so, or that a failure so to do was neglect to exercise ordinary care. An employee has a right to act upon the theory that his employer has used reasonable diligence to provide reasonably safe appliances and himself exercising ordinary care; if his attention has not been called to a defect or danger and the same is not obvious, he is not chargeable with notice of a defect which could only be discovered by a careful inspection.—Wood on Master and Servant, section 332-385; *Rice & Bullen Malting Co. v. Paulsen*, 51 Ill. App., 123.

The obligation to use reasonable care in furnishing appliances for the use of employes is one that cannot be delegated so as to absolve the master from responsibility for negligence in this regard, and if such care is not used and the servant is injured because of insufficient, unreasonable and insecure appliances, he, having no notice of the defective condition, may recover.—*D. & R. G. R. R. Co. v. Sipes*, 26 Colo. 17; *Pullman's Palace Car Co. v. Laack*, 41 Ill. App. 34; *Tudor Iron Works v. Weber*, 31 Ill. App. 306.

Further, upon the question of the assumption of the risk because the plaintiff was a timberman, and thereby, as counsel contend, assumes the risk ordinarily incident to and naturally arising out of the employment, the authorities are to the effect that he does not assume unusual and extraordinary risk caused by the master's negligence unless such risks are open visibly or the servant has knowledge of them.—*Garity v. Mining Co.*, 27 Utah 534.

In the case of *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. App. 368, it is said:

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"The rule that the servant takes the risk of the service pre-supposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. * * * It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes."

In the same case it was further said:

"That no duty belonging to the master to perform, for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance."

In the case at bar the original construction is chargeable to the master; he is held to the duty of having exercised ordinary care for the safety of his employees, both in construction and in the material selected therefor and in its being suitable for the purpose intended. There is evidence that he did not do so. This was a question for the jury to determine.

When constructing it, the then employees of the company had every opportunity to inspect and observe the defective condition of the caps. They had the handling and examination of this timber when it was being placed where it was used and therefore had every opportunity to discover its defective condition for the purposes intended, if such existed, and there is not a scintilla of evidence that even suggests that the defective condition of this timber was known to the plaintiff. It was not open or visible and we cannot say, as a matter of law, by the exercise of ordinary care that he would have known of it. It was the cause of the injury, as testified to by the plaintiff and his witnesses.

The exception to the safe place rule that it does not apply where the work being done by the employee in the making or repairing of the place, as in substance

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held by this court in the cases of *City of Greeley v. Foster*, 32 Colo. 292; *Poorman Silver Mines v. Devling*, 34 Colo. 37; *Maloney v. F. & C. C. R. R. Co.*, 39 Colo. 384, has no application to this case.

The plaintiff had nothing to do with the construction of this timbering, his duties, as shown by the evidence, were in doing timbering where the miners were at work and in case he found a board or cribstick misplaced elsewhere or broken upon top of the timbering in the drift theretofore constructed by others, it was his duty, presumably, to fix it; but all the testimony introduced, including that of the shift-boss, goes to establish that it was never intended that the plaintiff make an inspection of this framework under the cribsticks. All appear to have assumed, as they had a right to, that that was constructed suitably and sufficiently safe for the purposes intended, and that the timbers used therein were of sufficient size, strength and shape to make them reasonably safe for the purposes and in the manner in which they were used. The plaintiff had a right to presume that the company, through its former agents and employees, performed all these duties. At the time of the accident he was not engaged in inspecting or repairing these timbers, but did examine the cribsticks before he stepped on them, and, according to his testimony, they were all in proper condition and would have been perfectly safe had it not been for the defective cap underneath.

The judgment is reversed and the cause remanded for a new trial in harmony with the views herein expressed. *Reversed.*

Mr. JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

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[No. 6519.]

CONE, EXECUTRIX V. ELDRIDGE ET AL.

1. PRACTICE IN SUPREME COURT—*Harmless Error*—The plaintiffs had become guarantors upon several promissory notes executed by defendant's testator, and another. They had severally paid large sums of money in liquidation thereof, and presented several individual claims against the estate, for the money so expended. As assignees of the notes so executed they also presented a joint claim thereon. The executrix moved the county court to require the claimants to elect between the several claims and the joint claims; also to strike out the joint claim, because based on the same payments which were the foundation of the several claims. On similar and other technical grounds she demurred to all of the claims. These motions and demurrers were severally denied, the joint claim was allowed, and the individual claims rejected. No question was made as to the authenticity of the notes nor as to the alleged payments; nor any claim that these had been reimbursed. It appearing that the amount of the joint claim was in fact less than the amount of the several claims, it was held that whatever error had been committed in the conduct of the matter was harmless—(567, 568).

So to allow the examination of an incompetent witness whose testimony is in no way prejudicial to the complaining party—(571).

2. ——*Questions Not Presented Below*—Will not be considered—(571).

3. GUARANTEE—*Distinguished From Suretyship*—The surety is primarily liable upon the same contract with the principal. The guarantor is bound for the performance, by the principal alone, of a collateral contract, from which the guarantor's undertaking is separate and distinct. The guarantor's discharge of his obligation does not extinguish that of the principal, to which the guaranty relates. Therefore upon payment by the guarantor of a promissory note guaranteed by him, he becomes entitled to its possession, and to maintain an action upon it against the maker—(569).

4. PARTIES—*Joinder of Plaintiffs*—Several guarantors of several promissory notes, of which defendant's testator and another were the makers, had become assignees of these notes. They were entitled to maintain a joint action thereon against the executrix; and it was held that in what proportion they had

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contributed to the payment or purchase of the notes was of no concern to the executrix—(570).

And though it appeared that the wives of some of these guarantors had united with them in mortgages, to secure the guaranty, and that another party, not otherwise connected with the transaction, had executed a similar mortgage, and that these securities were accepted and applied upon the notes, these circumstances were held insufficient to overthrow the presumption arising from the endorsement and delivery of the notes to the plaintiff—(572).

5. JUDGMENT—*Satisfaction—Effect*—In the same case it appeared that judgment had been recovered against both the makers of the notes, and had been satisfied. The executrix contended that inasmuch as this satisfaction discharged the other maker, the testator's estate was chargeable for only one-half the amount of the joint claim. Inasmuch as the satisfaction was entirely the result of payments made by the plaintiffs, this contention was rejected—(571).

6. EVIDENCE—*Sufficiency*—That in an action in the courts of Colorado, upon certain promissory notes, by the guarantors thereof, to whom they have been assigned, one of the notes is designated as "Ex. 6," is no evidence that such note is identical with one referred to in the complaint in a former action in one of the courts of Utah, and there designated as "No. 6," and alleged to have been paid—(573).

Appeal from Fremont County Court—Hon. J. L. COOPER, Judge.

Messrs. TAYLOR & SAYRE and Mr. HARDY SAYRE for appellant.

Mr. CHARLES E. WALDO, Mr. CLYDE C. DAWSON and Mr. JAMES A. STUMP for appellees.

Mr. JUSTICE GABBERT delivered the opinion of the court:

W. H. McClure and James J. Cone executed eight promissory notes to the Deseret Savings Bank, of Salt Lake City, aggregating thirty-eight thousand dollars. Seven of them were for five thousand dollars each, and one for three thousand dollars. These notes were se-

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cured by a mortgage on real estate executed by Cone. The payment of the three thousand dollar note, and four of the five thousand dollar notes, was guaranteed by John Sharp, Elias A. Smith, E. R. Eldridge and James Sharp, the remaining five thousand dollar notes being guaranteed by Smith and Eldridge. When the notes matured the mortgage securing them was foreclosed. In this action judgment was also rendered against the guarantors. The mortgaged property was sold, with the result that a large part of the indebtedness evidenced by the notes was unsatisfied. Afterwards the guarantors severally paid sums to discharge the unsatisfied balance of the judgment. Cone died, and John Sharp, Smith and Eldridge filed their respective claims against his estate, by which each claimed individually the amount he had paid as guarantor of the notes in question. James Sharp had also died, and his executors filed a claim against Cone's estate for the amount which he had paid on account of his liability as a guarantor. In addition to these individual claims, the several claimants filed a joint claim against the Cone estate, in which it was stated that the McClure and Cone notes had been assigned, transferred and endorsed to claimants on which there was due them the sum of $28,616.92. The issue of the indebtedness represented by these several claims was tried to the court, and judgment rendered on the joint claim in the sum of $33,911.02, the individual claims being disallowed. From this judgment the executrix has appealed.

In advance of the hearing the executrix moved the court to require claimants to elect between their individual claims and joint claim, and after such election, to strike the other claim or claims, on the ground that all the claims arose out of the same notes and transactions, and that the individual claims and joint claim were inconsistent. The motion was held for

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consideration until the evidence was all in. The executrix next moved the court to strike the joint claim for the reason that the several claims disclosed that all arose out of, and were based on, the same notes and transactions (this was admitted by counsel for claimants); and also showed that the only relief to which claimants were entitled was to be reimbursed in such sums as each had paid separately as guarantor. This motion was overruled tentatively. The executrix then demurred to each of the claims, upon the following grounds:

(1) That as to each individual claim, there is another action pending, to-wit, the joint claim.

(2) That as to the joint claim, other actions are pending, to-wit, the individual claims.

(3) That as to the joint claim, there is a misjoinder of claimants.

(4) That as to all the claims, there is an improper joinder of causes of action.

(5) As to each claim, want of facts.

This demurrer was overruled. When the testimony was completed, the executrix renewed her motions, to which reference has been made. They were then overruled.

The first point urged upon our attention by counsel for appellant, is, that the court erred in overruling the motions and demurrer. In support of this contention it is said that the claims are inconsistent; that claimants could not have both an individual and joint claim growing out of the same transaction, and that they were bound to know, in advance, which statement regarding their claims was true. If the Civil Code governs proceedings of the character under consideration, (upon which we express no opinion), a serious question would be presented, were it not for the fact that the record affirmatively discloses that the executrix was not prejudiced by overruling the

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motions and demurrer. There is no claim that the notes were not executed by Cone and McClure. There was no claim of a failure of consideration. It stands undisputed that severally the claimants paid sums which, in the aggregate, discharged the amount due on the notes, after deducting the amount realized from a sale of the mortgaged premises. Their individual claims were disallowed. It is not claimed that claimants were ever reimbursed in any sum whatever for the amount which they paid to discharge their obligation as guarantors, and the judgment which was rendered was only for the amount which they paid for this purpose. In fact, it appears that the judgment on the joint claim is for a less sum than the individual claims aggregated, for the reason that in the former there was only claimed and allowed the amount paid necessary to take up the notes, while in the individual claims the several amounts claimed included costs, which the respective parties paid to satisfy the judgment rendered in the foreclosure proceedings, and interest at a higher rate upon the several amounts thus paid than provided for in the notes. So that it clearly appears the executrix was not prejudiced by the rulings complained of. Our Civil Code, § 78 Mills', expressly provides:

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. * * *"

The material and important question is, whether the testimony established a joint claim upon the notes. It is urged that it does not, because it appears the money paid by each claimant was paid out of his individual funds, and not out of any joint funds belonging to them; and hence, it is contended, the claim of each was individual. In other words, it is con-

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tended that there being no joint right, no joint recovery could be had. It is also claimed that, as under their contract of guaranty, the claimants were each responsible for the entire sum which their contract covered, the discharge of their contract by payment was a payment of the notes to the holder, and not a purchase of them from it. Neither of these propositions is tenable. We will consider the latter first. There is a marked distinction between a contract of guaranty and one of suretyship. A surety is primarily liable on his contract; that is to say, he is bound with the principal on the identical contract under which the liability of the principal accrues, while the guarantor is only bound for the performance of a prior or collateral contract, by which the principal is alone obligated; that is, the contract of the guarantor is separate and distinct from that of his principal, so that the liability of a guarantor does not attach until default by his principal. In other words, the obligation of a surety is primary, and that of a guarantor secondary.—20 Cyc., 1400; 2 Daniel on Negotiable Instruments, § 1733.

Because of this distinction, the discharge of the contract of guaranty by the guarantor does not extinguish or satisfy the obligation to which the contract of guaranty relates; consequently, it is universally held that upon payment of a note by a guarantor, when only secondarily liable, he becomes entitled to the possession of such note, and may maintain an action upon it against the maker.—2 Daniel on Negotiable Instruments, § 1758; *Tebery v. Swenson*, 32 Kan. 224; *Anthony Investment Co. v. Law*, 62 Kan. 193; *Jennings v. Pratt*, 19 Utah 129; *Jacobs v. Pierce*, 132 Ill. *App.* 547.

Such, in effect, as applied to the facts of this case, is the provision of our Negotiable Instruments Act, § 4584 Rev. Stats. 1908. We therefore conclude

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that the discharge of the contract of guaranty did not extinguish the notes, and that claimants, if they were the joint owners, could maintain a joint claim thereon against the makers or either of them.

The testimony disclosed that the sum or sums which each paid was out of his individual funds, but after these payments the notes to which their contract of guaranty related were assigned and delivered to them jointly. Whether the funds by reason of which this arrangement was affected were joint or individual is immaterial, if, by an agreement between themselves with the holder of the notes, they became the joint owners thereof. In such circumstances the amount to which each of the joint owners would be entitled of the sum recovered from their principal would, doubtless, be in proportion to what each had paid, but that is not a matter in which the maker is concerned; so that from the testimony it not only appears that claimants were the joint owners of the notes in question by a special arrangement between themselves and the holder, but that they also became such owners of the notes which they jointly guaranteed by operation of law. Perhaps the latter would not, of itself, entitle them to maintain a joint claim on all the notes, but the arrangement between the holder and themselves, to which we have referred, did.

The executrix objected to the introduction of any testimony to support the joint claim upon the ground that it had not been properly exhibited. This objection was based upon the assumption that the claim was founded upon a judgment, and that for this reason the exemplification of the judgment should have been filed. This assumption is not warranted. The claim was based upon the notes which claimants had guaranteed and paid. These notes were attached to, and filed with, the claim.

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It developed at the trial that the claim was verified by one of the claimants before Hyram S. Young, a notary, and also one of the claimants as executor. For this reason it is urged that the claim was not properly verified. No such objection was made below, and will not be considered here.—*Jakway v. Rivers*, 48 Colo. 49; *Rice v. Cassells, ibid*, 73.

W. H. McClure was called as a witness on behalf of claimants. Counsel for the executrix objected to his being permitted to testify, upon the ground that he was disqualified by virtue of the provisions of § 4816, 2 M. A. S., which provides, in substance, that a person interested in the result of an action to which an executrix is a party, shall not be permitted to testify as a witness for the adverse party to such action, except in certain cases, and that the witness did not come within the exceptions. It is unnecessary to determine whether or not the witness was disqualified by virtue of the provisions of this section. His testimony was of a character that it could not possibly have been prejudicial to the interests of the executrix or the estate which she represents.

The judgment rendered in Utah was satisfied, and for this reason it is urged that as such satisfaction released McClure, the Cone estate could only be held for one-half of the amount of the joint claim of claimants. The satisfaction was the result of the guarantors, who are claimants, complying with their contract. Had McClure paid the judgment, claimants would not have been required to pay anything, but as he did not, they were compelled to pay the sum represented by their joint claim, which imposed upon their principals a joint and several obligation to reimburse them for the money expended to discharge their contract of guaranty. This is the obligation which they sought to enforce by their joint claim. In the circumstances above noted, the fact that the judg-

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ment had been satisfied which operated to release McClure from further liability thereon to the original judgment creditor, is immaterial.

To further secure the notes executed by Cone and McClure, James Sharp and wife, and John Sharp and wife, and one Emily C. Smith mortgaged other lands. It appears that these securities were applied upon the notes in question. For this reason it is urged that to the extent such securities were credited upon the notes by accepting or subjecting property belonging to others, claimants are not entitled to recover. In other words, it is urged that we must assume that one-half of the property mortgaged by James Sharp and wife belonged to the latter; that a similar condition existed with respect to the property mortgaged by John Sharp and wife; and that Emily C. Smith was the owner of the property which she mortgaged, and that therefore property other than that of the claimants was taken or accepted upon the notes, and to this extent they have no claim against the Cone estate; but that whatever claim exists on this account belongs to the parties not guarantors whose property was applied upon the notes. We do not think there is any merit in this contention. These additional securities were unquestionably given to secure the contract of guaranty. The original notes were endorsed and delivered to the claimants by the payee, and we must assume that they paid the whole consideration to the bank for the use of those entitled thereto necessary to obtain such assignment, and are the owners thereof, there being nothing from which to infer the contrary; otherwise, the notes would not have been endorsed and delivered to them.—*Gumaer v. Sowers*, 31 Colo. 164.

It is claimed that in no event can claimants recover upon the five thousand dollar note designated as Exhibit No. 6. This claim is based upon the ground

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that in the complaint filed in the Utah court to foreclose the mortgage securing the Cone and McClure notes, it is alleged that this note had been paid. It is true that this complaint does allege the payment of the note designated therein "Number 6", but that wholly fails to establish that what is designated in the record before us "Ex. 6" is the same note referred to in the complaint as "Number 6". According to the exhibit and serial numbers, when arranged in their order, the exhibits are numbered from 1 to 7, inclusive. The serial numbers are from 1459 to 1466, inclusive, with No. 1464 omitted. By whom these numbers were placed on the notes does not appear. They are not so numbered and designated in the complaint, and we cannot assume that "Number 6" therein is the same note in the record here designated "Ex. 6",—No. 1465. But if we adopt the contention of counsel for appellant to the effect that the serial numbers were the registry numbers of the payee bank, and that the notations, "Ex. 1", etc., were evidently used by the parties and adopted by the court in which the action to foreclose the mortgage securing the notes was pending for the purpose of identifying the several notes, then it is evidence that what is designated in the complaint as "Number 6" is not "Ex. 6", with the additional identification "No. 1465", for the very obvious reason that the note alleged to have been paid would not have been presented to the court, and must have been the note bearing the serial number 1464, which is not one of the notes exhibited on behalf of the claimants.

It is also urged on behalf of the appellant that much irrelevant and immaterial testimony was introduced by claimants, and that the court failed to consider all the testimony introduced when determining the validity of the joint claim. We do not deem it necessary to go into consideration of these matters

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in detail. As previously intimated, the validity of the joint claim was established by uncontroverted testimony regarding the competency of which there can be no question, and the court was clearly right in rendering the judgment it did. Had it failed to do so, it certainly would have erred to the prejudice of the claimants. There was no dispute regarding the facts upon which their claim is based. It is true that the judgment rendered is a large one, but claimants are entitled to it because of the obligation which their compliance with their contract of guaranty imposed upon their principal.

Other errors are assigned which it is not necessary to specifically notice, because the disposition of other questions to which we have given attention demonstrates that they are without merit.

The judgment of the county court is affirmed.

Judgment Affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 6636.]

WILEY V. THE PEOPLE.

1. CRIMINAL LAW—*Murder*—One resisting an assault uses force not greatly disproportionate, according to all the circumstances of the situation, or uses a weapon from the use of which death would not naturally or ordinarily result, and through accident, or without due caution, kills his assailant, he is not guilty of murder—(579).

2. ——*Instructions*—Plaintiff in error was convicted of murder in the second degree. He defended on the ground of misadventure, or that, at most, his offense was involuntary manslaughter. The trial court instructed upon the mistaken assumption that defendant defended on the ground that he gave the fatal blow in self defense, and withdrew from the jury the defense of involuntary manslaughter. *Held* fatal error—(578).

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Error to Weld District Court—Hon. HUBERT L. SHATTUCK, Judge.

Mr. WILLIAM H. TRINDLE for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, Mr. CHARLES O'CONNER, assistant attorney general, Mr. GEORGE A. CARLSON, district attorney for the people.

Mr. JUSTICE WHITE delivered the opinion of the court:

E. Wiley was charged with the murder of Swan Hager. Upon trial, he was convicted of murder in the second degree, and sentenced to the penitentiary for a term of not less than ten or more than eleven years.

The defendant and Hager, in company with several other men, were at the Shamrock Coal Mine in Weld county, where they had congregated with their wagons and teams for the purpose of purchasing coal and hauling the same to their respective homes. Wiley and deceased were not acquainted, though they had seen each other a few times, and there was no unfriendly feeling between them. There was some evidence tending to show that deceased, during the afternoon, became somewhat intoxicated. At the mine was a barn which had been provided by the management of the coal company for the purpose of accommodating those who were detained over night. Under the rules governing the use of the barn, those desiring stalls therein could reserve the same, as against other claimants, by tying their halters in the stalls, or placing feed in the feed boxes. Wiley, in accordance with such rules, appropriated stalls for his own team and that of two teams driven to the mines by his sons earlier in the day. About 5 o'clock deceased, and other members of his party, drove to the barn and unhitched their horses, and deceased inquired of Wiley if there were

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any vacant stalls, and was informed that all stalls on that particular side of the barn had been appropriated, as evidenced by the halters and feed. Wiley's wagon was standing about ten feet east, and a little south, of the southeast corner of the barn, with the tongue pointing to the southwest. There was a door on the south side, and also another on the north side of the barn. Just before the conversation detailed above, Wiley had been engaged in gathering up hay or straw, with a short handled, three-tined pitchfork, at a point about twenty feet east, and a little south of the northeast corner of the barn, and carrying it into the stalls for bedding purposes. Immediately after the conversation Wiley resumed this work, and observing Hager in the act of tying his team to the rear of Wiley's wagon, requested him not to do so, as the team would destroy his grain. Hager thereupon used some profanity, and several times wanted to know of Wiley if he was afraid the team would eat the wood on the wagon. To this Wiley made no answer, but continued at his work raking up hay or straw. Hager untied his team, and holding the halters thereof in his left hand, said to Wiley: "To hell with you and your halters", and shortly afterwards started walking rather rapidly toward Wiley, leading his team with his left hand,—as claimed by Wiley and his witnesses,—and extending or holding his right hand in a threatening attitude as if to strike. Wiley told Hager to stop, that he wanted no trouble with him, and repeated the request two or three times, to which deceased paid no attention. Deceased advanced on Wiley, the latter retreating two or three steps, until, as he testified, he was almost against a wire fence, when, as he and his witnesses claim, deceased was about to strike or jump upon him, he reversed the pitchfork, and struck Hager with the handle, the blow falling on the left side of the head, inflicting a scalp wound two inches

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in length. Wiley made no attempt to strike a second blow, but, as he claims, waited to see whether Hager would press the attack further. The latter was felled by the blow, but immediately got up, and led his team away. Thereupon Wiley resumed his work. The latter had on a heavy coat, a pair of mittens and overshoes, and testified, that he had been sick for some time, very lame in the back, and unable to do any work, and that he had no other intent in striking deceased than simply to keep him off, and "did not pick out his head or any other particular place to strike."

Some of the witnesses for the people testified, that they did not observe any threatening attitude on the part of Hager as he advanced towards Wiley, and thought that Hager's right hand was not uplifted at all. The theory advanced by counsel for the people was, that while Hager, with his left hand was leading his horses along the east side of the barn, towards the north door thereof, with intent to put them in the barn, he was, without provocation, viciously and unlawfully assaulted by Wiley.

Within two or three hours after the difficulty a physician dressed the wound inflicted on the deceased, and thereafter, from day to day, the deceased visited physicians for the purpose of having the wound treated. About February 22d his physician, concluding that Hager was in a dangerous condition, sent him to the hospital at Greeley, where the skull under the wound was trepanned. That night, or the next morning, Hager died. The physicians attending deceased and making the autopsy, testified that there was no fracture of the skull, or any injury to the brain or its tissues, arising directly from the blow, and that the immediate cause of death was septic inflammation of the brain, caused by the emissary veins carrying from the external wound to the brain, poison arising from the infection of the wound in the scalp.

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The court in its instructions, told the jury that Wiley relied upon the plea of self-defense, and gave the usual instructions upon that theory. And, contrary to the facts in evidence, specifically instructed that "the defendant has testified in this case that he was in actual fear of losing his life, or of receiving great bodily harm at the time he struck deceased with the pitchfork." The court also, after defining the two grades of manslaughter, instructed the jury that involuntary manslaughter "is eliminated from your consideration in this case, because there is no evidence whatever to sustain it".

The court evidently misconceived the nature of the defense on which Wiley relied. It was not that he struck the blow to save his own life, or to prevent the infliction of great bodily harm, but that he was assailed by Hager, and in resisting the attack, and because of his manner of dress and weakened condition, and in order to put himself upon an equality with Hager, he struck the latter with an instrument, not necessarily a deadly weapon, or which, from the use made of it, could be presumed to be a deadly weapon, and that in so doing, but without any such intention, he unfortunately struck the blow which, probably, eventually resulted in Hager's death, and that the homicide was entirely accidental, or the result of misadventure, and therefore excusable, or at most could be no greater crime than involuntary manslaughter.

The prejudice to plaintiff in error consisted, not only in failing to state the true character of the defense, but, as stated in *Nilan v. The People*, 27 Colo. 206, 211, "* * * * especially in submitting to the jury a defense that was not made, and in support of which there was not a particle of evidence. There being no such defense as that submitted,—consequently there being no evidence to sustain it—the jury, if they

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obeyed the instructions, must necessarily find defendant guilty. We go further and say, if defendant had asked instructions on the law of 'self-defense', they should have been refused, because there was no evidence on which to predicate them. But the question here is not whether the defense of excusable homicide was made out. There was evidence in support of it, and the court should have instructed upon the law applicable to it."

Where one resisting an assault uses force not greatly disproportionate to the character of the assault, or uses a weapon from the use of which death would not ordinarily or naturally result, and through accident, or without due caution or circumspection, kills his assailant, he is not guilty of murder. Furthermore, the instruction given upon voluntary manslaughter did not properly define that offense.

Counsel for the people concede that the defendant did not testify, in substance, or to the effect, as stated by the court to the jury, and that the instruction of the court in that regard was purely an assumption upon its part. The instruction, when considered in connection with the defense relied upon by Wiley, was extremely prejudicial.

We can discern no distinguishing features in principle between this case and that of *Nilan v. The People, supra.* The judgment is, therefore, reversed, and the cause remanded. *Judgment Reversed.*

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 6668.]

NEWSOM V. JACOBS.

1. TAX DEED—*Void*—A treasurer's deed reciting a sale of lands to the county, on the same day on which the sale was commenced is void upon its face—(581).

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2. ——*Parol Evidence to Explain or Reform*—Parol evidence is not admissible to show that in fact the statute was complied with where the party asserting the tax title has failed to plead this state of facts—(582).

3. ——*Limitation*—A tax deed void upon its face does not set in motion the five year statute of limitation (Rev. Stat. Sec. 5733)—(582).

4. PRACTICE IN THE SUPREME COURT—*Questions Not Presented Below*—The defendant prevailing in the court below, will not, on error brought, be heard to allege that plaintiff should have been non-suited, where no motion for a non-suit was made in the court below—(583).

Error to Washington District Court—Hon. E. E. ARMOUR, Judge.

Mr. JOHN F. MAIL for plaintiff in error.

Mr. AUGUST MUNTZING and Mr. EGBERT MORE for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This is an action in ejectment; the plaintiff alleged ownership, etc., for Lot 12 in Block 6, Original Town of Akron, Washington county, Colorado. The defendant by answer, first, denied such ownership; second, alleged he was the owner of the lot and in possession; third, alleged he was the owner by virtue of a tax deed issued and recorded over five years prior to the bringing of the action. Judgment was for the defendant, holding the tax deed good. The plaintiff brings the case here for review upon error.

The evidence discloses that the lot in controversy was twenty-five feet wide and one hundred forty feet deep. The plaintiff deraigned title to about four-fifths of this lot (subject to any title transferred by the tax deed); she makes no attempt to establish her title to the remainder of it. The defendant being in possession of the entire lot, this was *prima facie* evi-

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dence of his right to possession as against the plaintiff to that portion of the lot to which she failed to establish her title.—*Moon v. Rollins*, 36 Calif. 333.

The defendant, over objections, offered in evidence a tax deed for this lot; the portion material to this controversy reads as follows:

"* * * whereas, the treasurer of said county, did, on the twenty-first day of October, A .D. 1895, by virtue of the authority vested in him by law, at (an adjourned sale) the sale begun and publicly held on the twenty-first day of October, A. D. 1895, expose to public sale at the office of the treasurer in the county aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, the real property above described, for the payment of taxes, interest and costs then due, and remaining unpaid on said property; and, whereas, at the time and place aforesaid, W. S. Stratton, Co. Treas. (for Washington Co.) of the County of Washington, and State of Colorado, having offered to pay the sum of six dollars and eighty cents, being the whole amount of taxes, interest and costs then due, and remaining unpaid on said property, for the above described property which was the least quantity bid for, and payment of said sum having been made by him to the said treasurer, the said property was stricken off to him at that price."

This was followed by the allegations of the sale of the certificate, by the county, its assignment to the defendant, his payment of subsequent taxes and the other matters, including the execution of the deed to him, etc.

Under the ruling of this court in the case of *Bryant v. Miller*, 48 Colo. 192, this deed recites facts, if true, which make void the sale upon which it is based. After the admission in evidence of this deed, the defendant over objections was allowed to intro-

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duce evidence to show that this tax sale was in fact commenced on the 7th of October of that year and continued until October the 21st, and also other matters in connection therewith.

In the case of *Page v. Gillett*, 47 Colo. 289, we held, that where a tax deed was void upon its face, outside testimony was not competent to show that the requirements of the statute wherein the deed was defective in so stating, had in fact been complied with; that in such case the proof might tend to establish valid sales, but that it would not mend void deeds; that it might be one step in the proof that the grantee was entitled to a good deed when he got a bad one; but that where the question was not in issue, viz., where the defendant had not plead or counted upon the facts that each step necessary to effect a valid sale for taxes was taken except as the deed itself shows, that he must be liimted in proof to the issues tendered. These principles are applicable here. The defendant plead title by virtue of a tax deed which he alleged was not subject to attack, having been issued and recorded for over five years prior to the institution of this action. Having relied upon his deed and the five-year statute of limitation, the deed being void upon its face for the reasons stated, he was not entitled to the benefit of this statute by showing *aliunde* that he would have been entitled to a valid deed. For which reasons, as the issues were made up we are of the opinion that the court erred in the admission of the deed as well as the other evidence in support of the regularity of the proceedings leading up to its execution.

The defendant makes the further contention, that if the plaintiff was entitled to recover at all, that she left the court below, and is leaving this court, in the dark as to just how much land she should recover. It is urged, that the burden to show this was

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on the plaintiff; that the case made in this respect was not sufficient to put the defendant to proof of his defense and for these reasons plaintiff should have been non-suited. An examination of the record fails to disclose any motion for a non-suit. At the close of the plaintiff's case the defendant proceeded with his evidence. The trial court erroneously held that the defendant's tax deed vested the title to the entire lot in him. This necessitates a reversal of the judgment.

Upon a new trial the issues may be materially changed. We do not think it incumbent upon us at this time to pass upon questions which may not be necessary to consider upon a second trial.

For the reasons stated the judgment is reversed and the cause remanded with leave to the parties to amend their pleadings as they may be advised.

Reversed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

[No. 6738.]

STARRETT V. RUTH.

1. JUSTICE OF THE PEACE—*Jurisdiction—Partnership Accounts*—A justice of the peace has no jurisdiction to settle the accounts of a partnership—(584).

Ambiguous testimony held to establish that, as to a portion of the claim asserted by plaintiff, it arose out of partnership transactions—(585).

2. INSTRUCTIONS—*Construction*—Instructions are to be taken as a whole. A partial and insufficient statement of the law in one point of the charge may be supplemented by what is set down in another—(586).

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3. PRACTICE IN THE SUPREME COURT—*Partial Error*—The judgment of the court below being erroneous in part the cause was remanded with directions to that court to modify its judgment, and as so modified it was ordered to stand affirmed.

The plaintiff in error was allowed his costs upon the writ of error—(587).

Error to Rio Grande County Court—Hon. ALDEN BASSETT, Judge.

Mr. IRA BLOOMFIELD for plaintiff in error.

Mr. JAMES P. VEERKAMP for defendant in error.

MR. JUSTICE HILL delivered the opinion of the court:

The defendant in error instituted this action before a justice of the peace. Upon appeal to the county court judgment was in his favor for $133.33; the plaintiff in error brings the case here for review upon error.

It stands admitted that as tried before the justice of the peace the action included items of, and an accounting pertaining to, a partnership existing between the parties. At the trial in the county court, upon objection, some of these partnership items were eliminated; the court correctly held that a settlement of partnership accounts is an equitable matter over which a justice of the peace has no jurisdiction and that in such case the county court was without jurisdiction over them upon appeal.—*Robinson v. Compher*, 13 Colo. App. 343.

Regardless of this ruling, the plaintiff thereafter was allowed to prove that he had paid the defendant $100 under a written agreement which, in substance, stated by virtue of said payment, that plaintiff became the owner of one share of stock of the par value of $100, in The Bellevue Baking Company. The agreement further provided that the plaintiff was to

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act as foreman of said bakery, etc., and was to receive one-half of the net profits of everything baked and sold; said bakery was to be opened as soon as practicable. It further provided that at a subsequent date plaintiff was to pay said company an additional $100 at which time he was to own a one-third of said bakery business and to have one-half of the net profits. This contract stated that it was to remain in force as long as mutually agreeable and could only be terminated by death, disability, or by mutual agreement of all parties interested.

The evidence discloses that at the time of the execution of this contract, and the payment of this $100, no such a corporation as therein named had ever been formed and that no such was thereafter created, but, regardless of this, that the parties opened up such an establishment upon some kind of a partnership basis. The particular arrangements under which they were to act are not disclosed.

The plaintiff testified, that he paid the $100 named in the contract, to become a part owner in the bakery business, and that he gave his work and this $100 to get a one-half interest; that he was to pay $100 more which was not yet due; that he did not expect the $100 to be paid back until the bakery business was settled up; that there had never been any settlement between them; that he claimed a one-half interest in the goods on hand as part owner in the business and also a half interest in the net profits of the sales. The plaintiff's judgment included this $100.

Instructions were given upon the theory that if the defendant had never delivered this share of stock the plaintiff could recover for the $100 paid; that it was no part of the partnership transaction. In this the court erred. While the contract is somewhat ambiguous, the evidence discloses that it was a part

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of the partnership transaction; that the plaintiff so treated it and upon the strength of this payment entered into the partnership business and so continued until certain difficulties arose between the partners.

The remainder of the judgment, $33.33, was for labor performed by the plaintiff at the instance and request of the defendant. It is admitted that this item had no connection with the partnership matters. The defendant disclaimed any liability for the reason, as he alleges, that these services were performed for his wife and not for him; that while he hired the plaintiff, he did so as his wife's agent. He complains of instruction No. 1 given upon this subject. It reads as follows:

"The court instructs the jury that if you find from the evidence in this case that the defendant employed plaintiff to work in the restaurant and did not disclose to the plaintiff that he was not the owner, then and in that event the plaintiff could hold the defendant in law for his pay."

It is claimed this instruction is faulty in that it ignores the fact that the plaintiff may have known who owned the restaurant, and, that although the defendant did not disclose to the plaintiff that he was not the owner, yet if the plaintiff knew this fact and knew that he was being hired to work for some one else, he could not recover against defendant. It is unnecessary to determine this question for the reason that another instruction was given which included everything contended for by the defendant on this question. The part pertinent reads:

"If the jury finds from the evidence that the defendant was simply the manager of the Bellevue Cafe or Restaurant and was not the proprietor and that fact was known to the plaintiff then he could not bring suit against the agent or manager, but should bring suit against the proprietor."

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Instructions are to be considered as a whole and when these are so construed, even if defendant is right in his contention pertaining to instruction No. 1, it was cured in the giving of the other. We find no error in this respect, if any question can be raised concerning them it would be whether they were not more liberal to the defendant than he was entitled.—*Hewes v. Andrews et al.*, 12 Colo. 161.

It follows that there was no prejudicial error pertaining to the item for labor performed by the plaintiff at the instance and request of the defendant in the sum of $33.33. The plaintiff was entitled to a judgment for that amount with his costs of suit. That portion of the judgment for the $100 connected with the partnership transaction is erroneous.

The judgment will be modified; the cause will be remanded with directions to modify the judgment in accordance with the views herein expressed, and as so modified it will stand affirmed. The plaintiff in error is entitled to recover his costs in the prosecution of this writ of error. *Modified and Affirmed.*

Mr. JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

[No. 6792.]

WHITEHEAD V. JOHNSON.

PLEADINGS—*Motion for Judgment*—A motion for judgment on the pleadings cannot be converted into a demurrer to the complaint.

Error to Denver District Court—Hon. JOHN I. MULLINS, Judge.

Mr. ANDREW WHITEHEAD, *Pro Se.*

Plaintiff in error brought suit to recoved damages from defendant in error for the alleged failure of

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the latter to carry out the terms of a contract or option for the sale of certain shares of stock to plaintiff. To the complaint the defendant filed a general demurrer, which was overruled. The defendant answered, and then moved for a judgment on the pleadings, which was simply a demurrer to the complaint, upon the ground that it did not state facts sufficeint to constitute a cause of action. This motion was sustained. Plaintiff has brought the case here for review on error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

A motion for judgment on the pleadings cannot be converted into a general demurrer to the complaint. —*Shuler v. Allam*, 45 Colo. 372; *Harris v. Harris*, 9 Colo. App. 211; *Mills v. Hart*, 24 Colo. 505; *Hoover v Horn*, 45 Colo. 288; *Rice v. Bush*, 16 Colo. 484.

The judgment of the district court is reversed and the cause remanded. *Reversed and Remanded.*

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 6818.]

RENO V. THE RENO AND JUCHEM DITCH CO.

1. PRACTICE IN THE SUPREME COURT—*Harmless Error*—The rejection of a pleading is harmless if the party is permitted to put in testimony as fully as if the pleading had been permitted to stand—(591).

2. ——*Questions not Presented Below*—Will not be considered in the court of review, e. g., where a corporation plaintiff is permitted, without objecttion, to prove at the trial, the proceedings by which it became incorporated, though these are not asserted in the pleadings—(591).

3. CORPORATIONS—*Evidence of Incorporation*—Incorporation is established, *prima facie*, by certified copies of the articles of incorporation and their renewal or extension—(592).

4. EVIDENCE—*Sufficiency*—Defendant having an interest in an irrigating ditch, participated in the organization of a cor-

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poration in the articles of association of which the same ditch was described, and it was set forth that the purpose of the parties was to protect their rights in the same ditch. He became a director and officer of such corporation, and a priority was awarded to the corporation in respect to the same identical ditch. These circumstances were held sufficient to exclude all inference of a retention by the defendant of an individual and separate interest in the ditch, and to overcome his affirmative evidence of such retained interest—(592, 593).

5. INJUNCTION—*Interference With an Irrigating Ditch*—Restrained by injunction—(591).

Error to Jefferson District Court—Hon. A. H. DEFRANCE, Judge.

Mr. JAMES P. WILSON for plaintiff in error.

Mr. J. W. BARNES for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Defendant in error, as plaintiff below, brought suit against plaintiff in error, as defendant, the purpose of which was to enjoin the latter from breaking the Reno and Juchem ditch and diverting water therefrom. By the complaint the material issues tendered were, that the plaintiff was a corporation, and the owner and in possession and control of the ditch in question; that it was engaged in carrying and distributing water to its stockholders and others for the irrigation of their lands; that it has, and has had, in its employ, at all times an efficient and capable superintendent, whose duty it was to measure the water diverted from the ditch to those entitled thereto according to his or her pro rata share, and to fix and adjust the various boxes through which such water is supplied; that the defendant had no interest in the ditch or the water flowing therein, yet, notwithstanding this fact, he had broken the banks of the ditch and diverted water therefrom, with-

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out right, permission, or authority, and against the will of plaintiff and its superintendent, and unless restrained, would continue to do so. The prayer of the complaint was to the effect that the court issue a temporary injunction, restraining the defendant from in any manner interfering with plaintiffs' ditch, and that, upon final hearing, such injunction be made perpetual.

On notice to defendant, a hearing upon an application for temporary injunction was had, and a temporary writ of injunction ordered to be issued, which was accordingly done.

Later, the defendant filed an answer, consisting of three separate and distinct defenses. In the fiirst he admitted that he broke the ditch and took the water therefrom, as charged in the complaint; but alleged that he did so because he was the owner of a one-fourth interest in the ditch and water rights, to which it was entitled. By his second defense, he pleaded *nul tiel* corporation. For a third defense he set up, by way of cross-complaint, that he was one of the original builders of the ditch, and by reason thereof an owner of an interest therein; that he had never sold or transferred this interest, which he alleged to be a one-fourth; that for more than twenty years before the commencement of the action, he had been in the open, notorious and peacable enjoyment of such interest, and the water rights thereto belonging, without hindrance or objection from the plaintiff, or any one; that he was, at the time of the commencement of the action, in possession of such interest, using and enjoying the same for the purpose of irrigating his land; that plaintiff had obstructed, was obstructing, and threatens to continue to obstruct, his enjoyment of the interest in the ditch and water rights unless enjoined by the court. He prayed that his interest in the ditch be quieted in him.

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On motion, the court struck out his cross-complaint. Plaintiff then filed its replication, denying every and all allegations of new matter contained in the answer not expressly admitted. The cause was then tried to the court, and judgment rendered, perpetually enjoining the defendant from committing the acts complained of in the complaint. The defendant has brought the case here for review on error.

On his behalf the following errors are assigned:

(1) That the court erred in striking his cross-complaint;

(2) That the plea of plaintiff to the plea of *nul tiel* corporation was not sufficient;

(3) The evidence does not establish that plaintiff was a corporation;

(4) The evidence does not establish that plaintiff was the owner of the ditch.

These several assignments will be considered in the order named.

(1) Conceding that the court erred in striking the cross-complaint, the defendant was not prejudiced. The record discloses that he was permitted to introduce testimnoy touching his ownership and rights in the ditch as fully as though his cross-complaint had not been stricken out.

(2) In support of the second assignment, it is urged that it was necessary for the plaintiff company to have replied to the plea of *nul tiel* corporation, by setting out the acts by which it became a corporation; that the plaintiff failed to do this, and that a mere denial of the facts alleged in the plea of defendant attacking the corporate existence of plaintiff was insufficient. Be this as it may, the plaintiff, without objection, was permitted to prove the acts and steps taken to bring it into existence as a corporation. If the replication was not sufficient to permit such proof, the question should have been raised

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in the trial court. It was not and will not be considered here.

(3) The testimony was ample to establish that plaintiff was a corporation. Certified copies of the original articles of incorporation, and of its extension or renewal were introduced at the trial. This proved *prima facie the* corporate existence of plaintiff. No testimony was offered to rebut it.

(4) The testimony on the part of plaintiff was to the effect that it had been in the open and exclusive possession and control of the ditch for many years. The defendant testified that he had been in possession and control of his interest for a long period of time; that he was one of the parties who constructed the ditch; that by virtue of such construction he became the owner of his interest, and that he had never parted with or conveyed it. It was for the court to determine from these conflicting statements whether or not the plaintiff was in the actual and exclusive possession of the ditch, and was entitled to such possession. There is testimony, which, to say the least, strongly corroborates its claim that it was. It appears from the certificate of incorporaion, executed in 1872, that defendant was one of the incorporators of plaintiff company, and by such certificate named a trustee. The ditch described in the certificate is the identical one in controversy, which defendant concedes, and it appears from the articles of incorporation or association that the purpose of the parties in associating by incorporating the company was to cover their rights in the ditch in controversy. It appears that later defendant acted as secretary of the corporation; and finally, the priority awarded to the ditch by the statutory adjudication was to the Reno & Juchem Ditch, the claimant of which, the decree recites, is "The Reno & Juchem Ditch Company, a corporation.

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There was also testimony on behalf of plaintiff to the effect that from and after its incorporation it had been in the absolute control of the ditch, down to the time the plaintiff had committed the acts complained of, which was in June, 1905.

It is clear from the record brought to our attention, that the judgment of the district court was right, and should be affirmed, and it is so ordered. In reaching this conclusion, we must not be understood as holding that defendant had any right whatever to have the issues tendered by his answer determined. On behalf of plaintiff it is contended that he did not, on the authority of *White v. Farmers' High Line Canal & Reservoir Company*, 22 Colo. 191. We have not regarded it necessary to determine whether that case is applicable to the one at bar. Counsel for defendant has contended that the judgment was wrong because of the errors assigned, which we have determined are without merit. Having concluded that the judgment should not be disturbed, for the reasons urged upon our attention by counsel for defendant, it is unnecessary to consider any other questions.

Judgment Affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 6847.]

GREENE V. CITY OF LOVELAND.

1. MUNICIPAL CORPORATIONS—*Implied Powers*—A municipal corporation which has title to the works by which its inhabitants are supplied with water, has implied power to make reasonable regulations for the protection of such works—(595).

2. STATUTES—*Construed*—A municipal ordinance provided that "no person shall do any plumbing to connect with or in connection with, any of the pipes of the department of water works," without a license. *Held* that the purpose of the pro-

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vision was to protect the works from injuries which might be occasioned if unskilled persons, or those not under municipal control,, were at liberty to intermeddle therewith; that it was not to be so limited as to apply only to plumbing work done upon the mains; that work upon private premises, intended to utilize water from the municipal system was likewise prohibited—(595).

Working as a mere helper, without a license, for one without a license, is within the prohibition—(595, 596).

Error to Larimer County Court—Hon. FRED W. STOVER, Judge.

Mr. E. S. ALLEN and Mr. I. J. DOKE for plaintiff in error.

Mr. AB. H. ROMANS for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Plaintiff in error was found guilty of violtaing an ordinance of the City of Loveland relating to plumbing. The ordinance in question is as follows:

"No person or persons shall be allowed to do any plumbing work to connect with, or in connection with, any of the pipes of the department of water works until such person or persons shall obtain a license from the board of trustees, which license shall be issued by the recorder, to operate and carry on the trade of a plumber, and the board of trustees may grant such a license to any person when it shall appear to them that the person applying is a proper person, and qualified and competent to perform the duties of the plumbers' trade, and may revoke said license at any time by giving notice to such person of such revocation, and he shall then cease to do any work to connect with, or in connection with the water works; and any person or persons licensed or to be licensed as aforesaid, as a plumber, shall, before receiving such license, or doing any work as such plumber, pay to the recorder

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for the town of Loveland the sum of twenty-five dollars for a license for one year, and no such license shall be transferable."

The evidence establishes that plaintiff in error performed work in the way of plumbing on appliances on private property, which were intended to utilize water from the water works system, and were diretcly connected therewith. On his behalf, the contention is made that the ordinance only applies when work is done in connection with the city mains. No such construction can be given the ordinance without doing violence to its plain meaning, and the language employed to express that meaning. Its purpose was to require persons performing work on appliances connected with the water mains, and intended to utilize water therefrom, to first obtain a license from the city authorities. The water works system belongs to the city. Subdivision 67 of section 6525 Rev. Stats. 1908, provides that the city council of cities and boards of trustees of towns shall have power to construct water works and maintain and operate them. The ordinance in question does not attempt to impose a license on the occupation of plumber, but is intended to protect the water works system owned by the city from damages and injuries, which would necessarily result if unskilled persons, or persons without any limitations whatever might perform work on appliances connected with the system. As the city owns the water works system, it impliedly possesses the power to make reasonable regulations for the protection of the system.

The testimony discloses that plaintiff in error worked as the helper, or at least he claims to have worked in that capacity, to a plumber. For this reason it is urged that the ordinance does not apply to his case. What might be the rule if the plumber under whose directions he worked had obtained a

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license from the city of Loveland, it is not necessary to determine, because such is not this case. If he had any license it was from some other city or authority. It further appears that plaintiff in error was not working for him, even though under his direction. He was employed and paid by the owners of the premises upon which the plumbing work was performed. In these circumstances we think plaintiff in error violated the ordinance.

The judgment of the county court is affirmed.

Judgment Affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 7008.]

EPLEY V. THE PEOPLE.

1. CRIMINAL LAW—*Plea of Former Jeopardy*—Information for the unlawful sale of intoxicating liquors alleged to have been made on or about August 31st. Plea that on September 2nd an information was exhibited against the defendant charging the sale of intoxicating liquors to the same person, at the same place on or about August 24th, trial, conviction, and sentence thereon; that upon that trial evidence was admitted, not only of the sale alleged in the information, but of all other sales, and the jury were charged that the exact date of the sale needed not be proven as alleged; and that by reason of the premises defendant had been in former jeopardy for the same offense, etc. *Held* that the plea was good in substance and called for a reply. —(597).

Error to Larimer County Court—Hon. FRED W. STOVER, Judge.

Mr. L. J. STARK and Mr. BERT MARTIN for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, and Mr. GEORGE D. TALBOT for the people.

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Mr. JUSTICE MUSSER delivered the opinion of the court:

C. L. Epley was convicted for selling intoxicating liquor in anti-saloon territory. The information, upon which he was convicted, was filed on October 9, 1909, in the county court, and charged him with selling liquor to Willis Hill on or about August 31st. To this information the defendant filed a plea of former jeopardy, alleging in substance that, on September 2nd, an information, which was set out, was filed in the same court, charging him with selling liquor to the same person in the same territory, on or about August 24th; that on September 21st, he had been tried, convicted and sentenced under the first information, (setting out the sentence); that, at the trial evidence was given, not only of a sale, as alleged in the first information, but also of all other sales; that the judge charged the jury at the trial of the first information that the exact date of the sale was immaterial and need not be proved as alleged. It was necessary for the plea to state that the offense for which he was prosecuted under the second information was the same offense for which he had been tried and convicted under the first, or that by reason of the trial and conviction under the first he had been in jeopardy of the same offense for which he was prosecuted under the second. In its concluding averments, the plea, in substance, stated, that, by reason of the former information, trial, evidence and conviction, the defendant had been in jeopardy of the same offense for which he was prosecuted under the second information. To this plea a demurrer was filed, stating, as a ground of demurrer, that the plea was void for uncertainty. This demurrer was sustained and nothing more came of the plea. While not deciding that such a demurrer would lie, it is enough to say that the

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plea does not appear uncertain. It could have been couched in language that would have made it plainer, but the substantial allegations of such a plea are stated.—1 Bish. New Crim. Procedure, Sec. 810. This being so, the plea called for a reply from the district attorney, and trial by jury of the issues of fact raised. —*Dockstader v. The People*, 43 Colo. 437.

The judgment is, therefore, reversed and the cause remanded with instructions to the lower court to overrule the demurrer, and that the matter then proceed according to law. *Reversed and Remanded.*

Mr. JUSTICE HILL and Mr. JUSTICE GARRIGUES concur.

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ADVERTISEMENT. See NOTICE.

APPEALS AND WRITS OF ERROR:

1. *Presumptions*—Where incompetent evidence is permitted to go to the jury, over objections, the error is presumed prejudicial unless the contrary affirmatively appears.—*Denver Co. v. Cowan* 74.

Evidence offered on the part of the plaintiff to establish the second cause of action in the complaint, was improperly received, without any restriction or limitation of it, by the court, to that particular cause of action. The evidence was of such character as to strongly influence the jury in considering the first cause of action. *Held*, that the withdrawal of the second cause of action did not cure the error.—*Denver Co. v. Cowan*, 78.

Uncertainties in the record will be resolved in favor of the party below; *e. g.*, as to whether an averment essential to the jurisdiction of the court below, appearing by interlineation in the complaint, was therein, when it was originally filed—*Dunkle v. French* 172.

2. *What May Be Assigned for Error*—A defect of parties injurious only to the successful party can not be assigned for error.—*Leary v. Jones* 200.

3. *Errors Waived*—The defendant, having, after the denial of his motion to dismiss an appeal, by which the cause had been brought from the county court to the district court, participated in the trial of the cause, *held*, that he was not in position to assign for error the denial of his motion to dismiss in the district court; that the error if any in the denial of his motion was waived.—*Silver Mountain Co. v. Anderson* 301.

4. *Cross Errors*—Where no cross-errors are assigned the appellee will not be permitted to argue errors alleged to have been committed against him.—*Mund v. Rehaume*, 134.

5. *Questions Not Presented Below*—The court will not entertain questions which were waived or not presented in the court below.—*Leary v. Jones*, 201; *Cene v. Eldredge*, 571; *Reno v. Reno & Juchem Co.*, 591.

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APPEALS AND WRITS OF ERROR—Continued.

The defendant prevailing in the court below, will not, on error brought, be heard to allege that plaintiff should have been non-suited, where no motion for a non-suit was made in the court below.—*Newson v. Jacobs*, 583.

6. *Party Concluded By Theory Adopted Below*—Where the complaint is framed upon a particular theory as to the measure of plaintiff's damages, and the case is tried upon the same theory, the defendant not objecting, he will not be heard to assign as error an instruction proceeding upon the same theory.—*Mountz v. Apt.*, 497.

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7. *Findings on Sufficient Evidence*, are conclusive on appeal.—*Merchants' v. Harris*, 102; *Cowan v. Howard*, 158, 159; *Branton v. Ditto*, 178; *Denver Co. v. Brumley*, 251.

8. *Harmless Error*—An absolute judgment for money, in an action of claim and delivery, will not be reversed where, upon a proper judgment, the appellant will be chargeable in a larger sum.—*Dunkle v. French*, 174.

Allowing an amendment which in no way effects the rights of the opposing party is harmless.—*Denver v. Rubidge*, 228.

The refusal of an instruction calling upon the jury to bear in mind, in considering the evidence of the plaintiff, her direct interest in the result of the action, is harmless, where a general instruction is given requiring that, as to all witnesses, the jury should among other things, take into account their interest, if any, in the result of the suit.—*Denver Co. v. Brumley*, 259.

Where the charge of the court as a whole is comprehensive, correct and fair, possible technical objections to segregated portions of it will not reverse.—*Id.*, 259.

The admissibility of evidence for the plaintiff in a cause tried without a jury will not be considered on an appeal by the defendant, where, irrespective of such evidence, sufficient is found in the record to support the judgment.—*Selfridge v. Leonard-Heffner Co.*, 317.

The exclusion of evidence which manifestly would not have changed the result is harmless even if erroneous.—*Mountz v. Apt.* 496.

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APPEALS AND WRITS OF ERROR—Continued.

So the improper admission of testimony having no relation to the important issue between the parties.—*Id.*, 496, 497.

In a prosecution for the unlawful sale of intoxicating liquors the only sales testified of were shown to have been made before the information was presented, and within the statute of limitations; an instruction not limiting the jury in these respects was held harmless.—*Epley v. People*, 505, 506.

The plaintiffs had become guarantors upon several promissory notes executed by defendant's testator, and another. They had severally paid large sums of money in liquidation thereof, and presented several individual claims against the estate, for the money so expended. As assignees of the notes so executed they also presented a joint claim thereon. The executrix moved the county court to require the claimants to elect between the several claims and the joint claims; also to strike out the joint claim, because based on the same payments which were the foundation of the several claims. On similar and other technical grounds she demurred to all of the claims. These motions and demurrers were severally denied, the joint claim was allowed, and the individual claims rejected. No question was made as to the authenticity of the notes nor as to the alleged payments, nor any claim that these had been reimburesd. It appearing that the amount of the joint claim was in fact less than the amount of the several claims, it was held that whatever error had been committed in the conduct of the matter was harmless.—*Cone v. Eldridge*. 567, 568.

So to allow the examination of an incompetent witness whose testimony is in no way prejudicial to the complaining party.—*Id.*, 571.

The rejection of a pleading is harmless if the party is permitted to put in testimony as fully as if the pleading had been permitted to stand.—*Reno v. The Reno and Juchem Co.*, 591.

9. *Transcript—Original Documents*—Action upon a promissory note. The defendant prevails upon the ground of an alleged fraudulent alteration. The paper itself is presented at the trial below, and witnesses are examined as to its appearance. If the defendant would have a review of the judgment for the insufficiency of the evidence as to the alleged alteration he must bring up to this court the original paper.—*Brunton v. Ditto*, 180.

Where the transcript sent up by the clerk of the court below fails to show that any appeal was granted, or any of the orders or proceedings necessary to a perfect appeal, and it does not appear that the attorney of the appellant filed with the clerk below

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APPEALS AND WRITS OF ERROR—Continued.
any præcipe for such transcript, indicating what should be inserted therein, as required by rule VIII of this court, leave to withdraw the transcript, in order to its amendment, will be denied, and the appeal will be dismissed without prejudice.—*Knudson v. Frost*, 341. 342.

10. *Abstract*—If the appellee desires to be heard as to the admissibility or effect of evidence offered on his part in the court below, it must be presented in the printed abstract.—*Mund v. Rehaume*, 134.

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1. *Forthcoming Bond—Effect*—The giving of a forthcoming bond by the defendant, and the release thereupon of his chattels which have been taken under attachment, does not dissolve the attachment.—*King v. Watson*, 296.

2. *Demand*—And where upon special execution issued from the county court, upon a judgment for the plaintiff, upon an appeal from a justice of the peace, neither the defendant nor the attached goods are found, the plaintiff may have his action against the sureties in the forthcoming bond, though no demand is averred.—*Id.*, 297.

3. *Sureties—Relation to Cause*—The sureties in a forthcoming bond given to release chattels attached in an action commenced before a justice are not strangers to the judgment given in the county court, on an apeal from the justice, in such sense that they may acquire rights in the attached property as against the parties to the action.—*King v. Watson, supra.*

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ATTORNEYS.

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BILL OF EXCEPTIONS.

1. *When necessary*—Where in *habeas corpus* proceedings, the record contains no bill of exceptions, the court of review will assume that the evidence sustains the findings of the court below.—*Breene v. Breene*, 344.

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2. *Time to Tender*—The court of first instance may at any time during the term at which the judgment is rendered allow time to tender a bill of exceptions.—*Denver v. Rubidge*, 226.

3. *Time of Filing*—If the bill of exceptions is tendered within the time allowed for that purpose, the fact that it is not filed until the expiration of that period, is immaterial.—*Denver v. Rubridge*, 227.

4. *Requisites*—The successful party, desiring to assign cross-errors upon the exclusion of evidence offered in his behalf, may require that the evidence so excluded be inserted in the bill of exceptions to his adversary.—*Mund v. Rehaume*, 134.

Even though the certificate to the bill of exceptions fails to aver that it contains all the evidence, if this is apparent from the bill itself, it will suffice.—*Denver v. Rubidge*, 226.

An exception to the final judgment must appear in the bill of exceptions. The clerk's note of the exception in the record is inapt, and without effect.—*Id.*, 226.

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BROKER.

Right to Commissions—To entitle a real estate broker to commissions it must appear that he was the procuring cause of the sale.—*Root v. Barbour*, 404.

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When the Writ Lies—The appraiser of an intestate's estate, under the inheritance tax law, made an unsatisfactory report. The county court of its own motion vacated the appointment of such appraiser and appointed another.

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CHATTEL MORTGAGE.

1. *Possession Remaining with the Mortgagor After Default*—Mortgagee of chattels who permits them to remain in possession of the mortgagor for an unreasonable time after the maturity of the mortgage debt, loses his lien as against the intervening claim of a third person.—*Owen v. Owen*, 94.

And where of two mortgagees of the same chattels, from the same mortgagor, each permits the mortgagor to retain the goods for an unreasonable time and after default made, he who first takes possession is preferred.—*Id.*

That his mortgage is junior in time, and that at the time of accepting it he has actual notice of the prior mortgage is immaterial.—*Id.*. 94.

Under the statute (Laws 1899 c. 86, Rev. Stat. sec. 518) thirty days and no more is allowed the mortgagee, after the mortgage debt matures, in which to assume possession of the chattels.—*Id.*, 94.

2. *Extension*—The period prescribed by the phrase "within thirty days after the maturity of the last installment of the indebtedness" in Sec. 520 Rev. Stat. begins with the day succeeding the day of maturity. An extension granted on the day of maturity is premature. A purchaser of the mortgaged chattels from the mortgagor, after the lapse of thirty days from the maturity of the mortgage indebtedness, takes free of the lien of the mortgage, notwithstanding such attempted extension.—*Ferris v. Chambers*, 370, 371.

CONSTITUTIONAL LAW.

1. *Conformity with Constitutional Requirements in Legislation*, may be determined by reference to the legislative journals. It therefrom it appears that the requirements of the Constitution were not observed the attempted enactment is without effect. But where the complaint is that in one house the provisions of sec. 22 of art. V. were not complied with, mere excerpts from the journal of that house, not assuming to state in what manner the bill passed on final reading will not suffice.—*Denver v. Rubidge*, 228.

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CONSTITUTIONAL LAW—Continued.

Whether the copy of the journals printed pursuant to laws of 1899 c. 109 is admissible in evidence, Quaere.—*Id.*, 228.

The section of the constitution relating to the title of bills (Sec. 21, Art. V.) must receive a reasonable construction. If the bill treats of but one general subject, and that is expressed in the title, this is sufficient.—*Trozzo v. The People*, 326.

The penalties prescribed for the violation of a statute are germane to so much of it as defines and denounces the crime, and need not be referred to in the title; but a title which by general words refers to the crime, and then to the punishment thereof, as by the phrase "and providing punishments," etc., is not within the prohibition of the constitution.—*Id.*, 326.

The title "An act concerning certain forms of prostitution and providing punishments for persons encouraging prostitution in violation of this act" (Laws 1909 c. 196) contains but one subject and is not open to objection.—*Id.*, 328.

2. *Police Power—Public Health*—The police power extends to the preservations and promotion of the public health. The Legislature may define and control the practice of medicine and prescribe the qualifications of those who assume to follow that calling.—*Smith v. People*, 273.

A statute requiring that "all abandoned mine shafts, pits, or other excavations, endangering the life of man or beast, shall be securely covered or fenced" (Rev. Stat. sec. 4297) is a legitimate exercise of the police power.—*Richardson v. El Paso Co.*, 446.

3. *Taxation—Special Assessments*—A complaint assailing an assessment for the expense of a district sewer averred that the Board of Public Works of the city is not a constitutional body; that the provisions of the charter relating to public improvements are unconstitutional; that the assessments were levied without regard to the question of benefits; that the natural slope of the land was sufficient to drain it; that lands without the district were benefited, and were not assessed; that lands within the district, and liable to assessment, were omitted; that the assessment of plaintiff's lands was excessive; that the system was a public, and not a local improvement; that it was not properly constructed; that the provisions of the charter as to the letting of contracts were disregarded; and that items of expense were improperly included. Held insufficient on the authority of *Denver v. Dumars*, 33 Colo. 94; *Denver v. Londoner*, *id.* 104; *Spalding v. Denver*, *id.* 72.—*Denver v. Rubidge*, 230.

4. *Special Assessments of Benefits*—The levy of an assessment upon lands, for a benefit occasioned by a public improve-

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CONSTITUTIONAL LAW—Continued.
ment is the exercise of the power to tax. The provisions of Sec. 15 of Article II of the Constitution have no application thereto.—*Alexander v. Denver*, 145.

Though such assessment is made in a proceeding under the statute of Eminent Domain, and is declared a lien upon the lands not taken, it does not result in depriving the land owner of the damages to which he is entitled for land taken, nor any part of such damages.—*Id.*, 145.

Neither does the fact that what is to be paid to the land owner for the land taken is raised by a general tax of which, with all other property owners, he must pay his share, have this effect.—*Id.*, 145.

The provision of the statute, (Mills' Stat. Secs. 4419, 4427, Rev. Stat. Secs. 6592. 6600), are not opposed to the Constitution. —*Id.*

5. *Exemptions*—The statute which assumes to relieve insurance companies from the payment of taxes upon their personalty (Laws 1907 c. 193, Secs. 16, 17, 18) is opposed to Sec. 10 Art. X of the constitution and void.—*Imperial Co. v. Denver*, 456.

6. *Criminal Information*—The omission from a criminal information of the conclusion "against the peace and dignity of the same," prescribed by Sec. 30 of Art. VI of the Constitution, does not render the conviction void. but goes to mere matter of form assailable only by motion, demurrer or writ of error.—*Chemgas v. Tynan*, 36.

5. *Public Officers—Increase of Salary*—Plaintiff was elected to the office of county judge of a county which was then in a class in which the salary of that office was declared to be a sum named, and "no more."

During his term of office the county was transferred to another class in which the county judge was, by statute, entitled to an allowance for clerk hire. *Held*, that under the constitution, Sec 30 Art. V, the plaintiff was not entitled to this allowance.—*Henderson v. Boulder County*, 367.

CONTINUANCE.

1. *Discretion of the Court*—A motion for the continuance of a cause is in a large degree addressed to the discretion of the court.—*Bradbury v. Whitney*, 290.

Only in the case of manifest abuse will the action of the trial court be reviewed.—*Mountz v. Apt.*, 493.

Whether in a criminal prosecution a continuance shall be granted or refused depends upon the showing made, the gravity of the offense, and other considerations, and is largely in the

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CONTINUANCE—Continued.

discretion of the trial court. Unless there is an abuse of discretion its ruling will not be reviewed.—*Epley v. People*, 503.

Defendant was accused of illegally selling intoxicating liquors in Larimer County. On the third of the month he was arraigned and pleaded, and the trial was appointed for the eighth of the same month. On the day of trial he appeared in person and by an attorney, and applied for a continuance, alleging as ground thereof that on account of the intervention of two holidays he had not been able to employ counsel until the seventh; that the attorney employed to conduct his defense resided in Denver; that he had not been able to intelligently advise him as to the offense with which he was charged, and that upon that day the attorney was employed in the federal court. No reason was shown for the employment of this particular gentleman, or for not employing some one of the able gentlemen of the bar residing in Larimer County. The counsel who actually conducted the defense appeared to have been entirely competent and the record showed no omission or neglect on his part. *Held*, that in denying the application, no abuse of discretion appeared. —*Id.*, 502-504.

2. *Absent Witness—Affidavit*—A motion for the continuance of a cause over the term, on account of the absence of witnesses, the affidavit not showing that their attendance cannot, by diligence be procured in the pending term, may be denied on this ground.—*Bradbury v. Whitney*, 291.

The affidavit must show the testimony which it is expected that the absent witness will give, so that the court may judge of its materiality. The statement that it is "very material" is a mere conclusion.—*Id.*, 291.

The action had been commenced in September. In June following it was set down for trial a month later. Of this the defendant had seasonable notice. Shortly before the trial defendant's attorney was suddenly called away upon important affairs, long pending, and left the cause in charge of another attorney. On the day appointed for the trial the defendant interposed an application for a continuance on the ground of the absence of two witnesses. The affidavit was sworn by his private secretary, the defendant himself not being present. As to one of the witnesses the affidavit stated that he had been suddenly called out of the state, but it was not shown that his deposition could not have been taken, nor that he would return during the pending term, nor what testimony he could give. As to the other witness it stated that he was an engineer in the employ-

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ment of a railroad company somewhere upon the line of its railroad. The only effort which was shown to procure his testimony was to address a letter to him, through the railroad company, to which no answer had been received. The motion being denied the attorney retired from the cause and a verdict was rendered in favor of the plaintiff.

Held, that inasmuch as to one witness the materiality of his testimony was not shown, nor as to the other diligence in procuring his testimony, it was not to be said that the court abused its discretion in denying the motion.—*Id.*, 290. 292.

Diligence, Required—Where the applicant delays in presenting his application, after he is aware of the facts upon which he proposes to ask for continuance, the application should be denied.

On the sixth of the month, the cause was set down for trial on the twentieth of the same month. Shortly before this a witness for the defendant had, to the defendant's knowledge, gone to the State of Ohio, but to what place in particular was unknown to defendant. Six days before the day appointed for the trial his whereabouts were ascertained. No application for delay was made until the day of the trial. The application was held properly denied.—*Mountz v. Apt*, 494.

CONTRACTS.

Mutual Assent—Mutual assent is established by an offer of one party, and acceptance by the other; and assent by one party to the offer of the other may consist in words alone, or in both words and acts.—*Michigan Co. v. Pueblo Co.*, 163.

Where one party performs the act which the offer of the other party contemplates, this is effectual as an acceptance of the offer.—*Id.*, 163.

Construction—Joint and Several—If a contract executed by several is in terms joint only, it must be valid and enforcible as to all, in order to the several liability of any.—*Smith v. Woodward*, 312.

No particular form of words is required to render a contract joint, or joint and several. The intent of the parties governs.—*Id.*, 312.

Certainty—A contract for the sale and delivery of a particular commodity, not specifying any amount or quantity, will not sustain an action for a failure to deliver. It binds the parties no further than may accord with their convenience or pleasure.—*McAllister Co. v. Eldora Co.*, 91.

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Defendant and another, being proprietors of two drug stores, sold the stock and good will of each to the plaintiff, and agreed in writing "not to go into the drug business as clerks or proprietors" within five blocks of either store. It was *held* that inasmuch as acting as clerks they must necessarily act separately, so that, to this extent, a several obligation was apparent, and as the injury to the plaintiff would be the same, whether they acted as clerks or proprietors, the contract must be held both joint and several as to both capacities.—*Smith v. Woodward*, 312, 313.

A corporation publishing certain newspapers leased a carrier's delivery route to the defendant for a term of years, agreeing to deliver to him a number of papers sufficient to supply all subscribers on the route, and the lessee agreeing to deliver them. The lease was in writing. One clause of it provided that on Monday of each week defendant should pay a certain rate for each of the different newspapers. *Held*, an absolute sale of the newspapers, the obligation to pay not depending on the carrier's ability to collect, and this interpretation of the clause in question was *held* to be fortified by other clauses requiring the carrier to investigate for himself, and determine the propriety of accepting subscriptions which might be offered, and that the carrier "shall be charged for the exact number of papers his route calls for." *Held further*, that this result is not qualified by a clause providing that if the agreement should be cancelled the carrier should "repay to the corporation all moneys collected in advance of the day of the cancellation," and that the corporation reserved the right to collect the moneys "then owing" to the carrier.—*News-Times Co. v. Doolittle*, 388-394.

A corporation publishing certain newspapers executed to Doolittle a written lease of a certain carrier's route, in several clauses, specifying the obligations and liabilities of each party.

At the foot of the same paper, under the title, "Guarantee," was a writing subscribed by Doolittle and two others, whereby it was provided that in consideration of the lease the three subscribers "guarantee and obligate themselves" to the corporation, that Doolittle "shall faithfully perform each and all of the terms of the above contract, and that in case of his failure, the other subscribers, upon demand, and the presentation of an itemized statement, etc., will pay to the corporation "all damages in full," but limiting the liability of the three subscribers, "as sureties under this contract," to a sum specified. *Held*, that

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CONTRACTS—Continued.
inasmuch as the contract of leasing, and the supplemental undertaking of the three were made at the same time, upon a single consideration, that the latter was executed by Doolittle as well as by the others, that the word surety appears, as well as the word guarantee, that all of the parties subscribed the latter agreement, and all thereby obligate themselves, absolutely, to pay at a fixed time, without reference to the solvency of Doolittle, the supplemental agreement must be regarded as one of suretyship, and not of guarantee; that the subscribers were liable severally as well as jointly; and that the failure to serve a statement of the damages upon one of the sureties did not affect the liability of the other.—*News-Times Co. v. Doolittle*, 394, 397.

Rescission—Merchant sued upon a bill of exchange given for goods which he was induced to purchase by false representations, offers to allow judgment for the return of the goods remaining unsold, and for the amount obtained by the sale of such part of the goods as has been sold. *Held*, a sufficient rescission.—*Johnson County Bank v. Gregg*, 363.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT.

1. *Of Infants*—A mnor *non sui juris* is required to exercise only such care as may reasonably be expected from one of his age, experience and intelligence. A child of nine years is presumably *non sui juris*; but the question is one of fact to be determined by all the circumstances of the case. If there is a fair doubt as to the child's capacity the question should be submitted to the jury.—*Richardson v. El Paso Co.*, 453, 454.

2. *In Care of Children*—A parent is required to exercise for the protection of his minor child against known dangers, or dangers which by reasonable care would have been known, that degree of care which reasonably prudent persons would have exercised in the same or like circumstances. A child of nine years was sent by the mother to the close vicinity of an abandoned shaft, one board of the cover of which was loose. The parents had previously sent an older son to repair it, and he had attempted to nail down one of the boards which he found loose. The father shortly afterwards examined the cover and thought it secure. Later the mine owner made some repairs and there was no evidence that the parents after this had notice that the cover was unsafe. *Held*, that whether the parents were guilty of negligence in the care of the child was a question to be left to the jury.—*Richardson v. El Paso Co.*, 455.

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CORPORATION.

1. *Residence*—A corporation organized under the laws of one state and doing business in another, by virtue of compliance with its laws, is not a resident of the latter state.—*New York Co. v. Pike*, 243.

2. *Evidence of Incorporation*—Incorporation is established, *prima facie*, by certified copies of the articles of incorporation and their renewal or extension.—*Reno v. Reno and Juchem Co.*, 592.

3. *Foreign—License Tax*—Under the decision of the supreme court of the United States in *American Co. v. Colorado*, 204 U. S. 103, the license tax imposed by the Revenue Act of 1902 (Laws 1902 c. 3, sec. 65), cannot be exacted from a corporation, which, before its enactment, had paid the entrance tax required by then existing legislation, and secured a license to do business in this state.—*Kirby v. Union Pacific Co.*, 542.

COURTS.

Grounds of Judicial Action—A court can act only upon what is alleged and proven. They are not at liberty to go out of the record and indulge in speculation.—*People v. Hard Land Co.*, 269, 270.

COUNTERCLAIM.

1. *For a Tort*—The negligent failure to perform a contract affords an action on the contract, and may found a counterclaim in an action brought upon a different contract.—*Michigan Co. v. Pueblo Co.*, 163, 164.

2. *Unliquidated Claim*—A claim is not to be rejected as a counterclaim merely because it is unliquidated.

The provisions of the code have for their purpose the avoidance of circuity and multiplicity of actions, and should be liberally construed.—*Id.*, 163, 164.

CRIMINAL LAW.

1. *Murder—Misadventure*—One resisting an assault uses force not greatly disproportionate, according to all the circumstances of the situation, or uses a weapon from the use of which death would not naturally or ordinarily result, and through accident, or without due caution, kills his assailant, he is not guilty of murder.—*Wiley v. People*, 519.

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CRIMINAL LAW—Continued.

2. *Practice of Medicine Without a License*—Defendant, without any license from the State Board of Medical Examiners, maintained an office for receiving, treating and healing the sick; assumed the title of Healer, and claimed that by virtue of power from the Almighty he was able to cure any disease that was amenable to the treatment of medical men. and many that were not. He made a charge against some of his patients; others he treated without charge. Held that though he belong to the Divine Scientific Healing Mission, an incorporated society, the objects of which were "healing suffering humanity by the laying on of hands," though he was a preacher in that society, and held services on Sunday, where he preached and healed the sick, inasmuch as he healed the sick or complaining, for hire, he had incurred the penalties of the statute. (Rev. Stat. c. 127.)—*Smith v. People*, 275-277.

3. *False Pretenses*—Mere non-disclosure is not a pretense, even though if disclosure had been made it would have deterred the prosecutor from parting with his money.—*Stumpff v. People*, 203.

The sale of chattels which are subject to an existing mortgage, without informing the purchaser of the incumbrance, is not a false pretense within the statute (Mills Stat. secs. 1378. 1379, Rev. Stat. secs. 1848, 1849), even though the title be warranted by the seller.—*Id.*, 203.

A false pretense not relied upon is not within the statute. —*Id.* 204.

That the accused violated the statute prohibiting the sale of mortgaged chattels without advising the purchaser of the mortgage (Mills Stat. sec. 392, Rev. Stat. sec. 524), has no relevance to an information charging the obtaining of the money by false pretenses.—*Id.*, 203.

4. *House of Prostitution—Statute Construed*—The statute (Laws 1909 c. 196, sec. 2) declares that "any male person * * * who shall engage or assist in operating of managing" any house, etc., for the purpose of carrying on prostitution, shall be deemed guilty of felony. *Held*, that in order to a conviction it must be shown that the accused had control of and conducted, or assisted in the management of the affairs of the house. so as to be in some manner responsible for the immoral practices there carried on; or must at least have been so in control as to be able to bring about, or assist in bringing about, such immoral practices; that to merely aid, abet, advise, or encourage another in the

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conduct of the house is not within the statute, and that to so construe it was to read into it the descriptive elements of an accessory, and so enlarge it by construction.—*Trozzo v. People*, 334-337.

The statute declared that "any person * * * who shall knowingly live on or be supported in whole or in part by the money or other valuable consideration realized, procured or earned by any female person through the prostitution of any other female," shall be deemed guilty of felony.

Held, that there could be no conviction where the proceeds of prostitution were received by the accused, knowingly, from the keeper of a brothel to pay a debt due him, or redeem a pledge for her, or where he had received such moneys, received by the brothel-keeper as the proceeds of another woman's prostitution, without anything done, or consideration parted with by the brothel-keeper, nor where the accused had received such proceeds of prostitution for a different purpose, and had afterwards applied a part of it to his own maintenance.—*Id.*, 334-337.

5. *Intoxicating Liquors—Illegal Sale—Who Chargeable*—One is not to be charged with the sale of intoxicating liquors, on Sunday, at a licensed tipping house, in violation of the statute, merely because the license issued to the tipping house was issued in his name, and so still stood of record, at the time of the commission of the offense. If in fact he had assigned the license, and had no control of, or connection with, the place, he is not chargeable, even though the license was not in law assignable.—*Lewin v. People*, 139.

The fact that the license issued to him, and stands in his name, is competent evidence to prove his connection with the place, but is not conclusive.—*Id.*, 139, 140.

6. *Information—Duplicity—Uncertainty*—An information which pursues the language of the statute (Laws 1901 c. 66, Rev. Stat. sec 1685) charging the stealing of a bicycle, feloniously purchasing it, and feloniously concealing the same bicycle, knowing it to be stolen, embezzled, etc., is not ambiguous, uncertain, or duplicitous.—*People v. Fitzgerald*, 177.

The mere statement of the district attorney that the different acts charged constitute one and the same transaction is a sufficient answer to a motion to quash such information.—*Id.*, 177.

The proviso in the statute (Rev. Stat. c. 127) "nothing in this act shall prohibit the practice of the tenets or general belief of any church, not prescribing medicines or administering

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CRIMINAL LAW—Continued.

drugs," is not descriptive of the offense, and need not be negatived in the information.—*Smith v. People*, 277.

7. *Arraignment—Plea*—Where the accused is tried and convicted without arraignment or plea, the judgment must be arrested.—*People v. Heath*, 183.

The provision of the statute (Mills' Stat. sec. 1433, Rev. Stat. sec. 1956) that no judgment shall be arrested "for any matter not affecting the real merits of the offense charged," has reference to the information, not to proceedings during the progress of the trial.—*Id.*, 184.

Plea of Former Jeopardy—Information for the unlawful sale of intoxicating liquors alleged to have been made on or about August 31st. Plea that on September 2nd an information was exhibited against the defendant charging the sale of intoxicating liquors to the same person, at the same place on or about August 24th, trial, conviction, and sentence thereon; that upon that trial evidence was admitted, not only of the sale alleged in the information, but of all other sales, and the jury were charged that the exact date of the sale needed not be proven as alleged; and that by reason of the premises defendant had been in former jeopardy for the same offense, etc. Held that the plea was good in substance and called for a reply.—*Epley v. People*, 597.

8. *Consolidation of Indictments*—Two indictments were pending against different defendants for the violation of the same section of the same statute; the crimes charged were committed at the same time and place, as disclosed by the record, and the facts as to the two were intermingled the one with the other. They were properly consolidated under the statute (Rev. Stat. sec. 1953; Mills Stat. sec. 1462).—*Trozzo v. People*, 329.

9. *Evidence—View*—Where in a prosecution for the sale of liquor to a minor, the evidence as to the age of the alleged minor is in conflict, the jury may take into consideration his size and appearance; but where such appearances are to be considered they should be detailed in testimony which can be preserved in the record.—*Quinn v. People*, 353.

Doubted if the omission of such testimony, or the preservation thereof in the record, would be error, where the attention of the jury is called to the appearance of the alleged minor, as evidence of his minority.—*Id.*, 352.

But where no evidence at all is offered upon the question of age, and the attention of the jury has not been directed to the

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CRIMINAL LAW—Continued.

appearance of the witness, for that purpose, a conviction can not stand.—*Id.*, 353.

Evidence—Dying Declarations—Declarations made at a time when the declarant expects to recover are not admissible as dying declarations.—*Ehrhardt v. People*, 206.

Contradictory Statements of Deceased—Declarations of the deceased made after he had received the fatal wound, are admissible to impeach his dying declarations. The impossibility of calling his attention to the former statement attributed to him renders the case an exception to the general rule requiring this.—*Salas v. People*, 465.

Res Gestae—Declarations of the person whose murder is charged, made at a time which is not fixed but subsequent to the commission of the injury, and which are merely expressions of his or her opinions as to the guilt of the accused are not *res gestae.—Id.*, 206.

Report of Testimony at Inquest—The report of the testimony of an immature and ignorant witness, at the coroner's inquest, varied from the testimony of the same witness, when examined for the people upon the trial of the indictment. *Held* that the district attorney might cross examine the witness, in order to refresh her memory, and endeavor to induce her to return to her statement at the inquest.—*Id.*, 207.

But the report of her testimony before the coroner, tending to show the guilt of the accused, was held inadmissible. and its admission fatal error, not cured by its subsequent exclusion.—207, 208.

10. *Instructions*—In the trial of one charged as a principal the statutory provisions as to accessories have no application, and the instruction should be limited accordingly.—*Trozzo v. People*, 338, 339.

Plaintiff in error was convicted of murder in the second degree. He defended on the ground of misadventure, or that, at most, his offense was involuntary manslaughter. The trial court instructed upon the mistaken assumption that defendant defended on the ground that he gave the fatal blow in self defense, and withdrew from the jury the defense of involuntary manslaughter. *Held* fatal error.—*Wiley v. People*, 578.

11. *Arrest of Judgment—Effect*—Where a judgment upon a criminal information is arrested for want of a plea by the defendant, he may be afterwards arraigned and required to plead. —*People v. Heath*, 185.

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CRIMINAL LAW—Continued.

12. *Writ of Error by the People—Judgment*—An accused person is not to be twice put in jeopardy by the judgment of the Supreme Court, in a writ of error prosecuted by the people, under the statute (Laws 1907 c. 162, Rev. Stat. sec. 1997). The Supreme Court merely approves or disapproves the ruling complained of.—*People v. Fitzgerald*, 176.

DAMAGES.

Proximate and Remote—Parties are liable only for the natural and proximate results of their acts, not for those which are remote and could not reasonably have been anticipated.—*Clark v. Wallace*, 439.

DEATH.

Statute Construed—The station agent of a railroad company charged with the duty to communicate to the conductor and engineer of the several trains the orders of the train dispatcher as to where they are to pass other trains, is managing the trains, within the meaning of Mills Stat. sec. 1508 (Rev. Stat. sec. 2056). If by his negligent failure to deliver an order, a collision occurs, and the death of a passenger results, the railway company is liable.—*Whittle v. Denver & R. G. R. Co.*, 382.

DEFAULT.

Vacating.—See PRACTICE.

DEMAND.

When Necessary—Where upon special execution issued from the county court upon a judgment for the plaintiff, upon an appeal from a justice of the peace, neither the defendant nor the attached goods are found, the plaintiff may have his action against the sureties in the forthcoming bond, though no demand is averred.—*King v. Watson*, 297.

The law does not require impossibilities.—*Id.*, 297.

DENVER.

Charter of 1893—Ordinances—Passage—It is not required, under sec. 20, art. VII of the Charter of Denver of 1893 that an ordinance erecting a sewer district should receive the vote of two-thirds of all the members elect of the City Council. In view of the provisions of sections 3, 4, of art. II a vote of two-thirds

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DENVER—Continued.

of a quorum in each house suffices, provided those so voting constitute a majority of all the members elected to the house in which the vote is taken.—*Denver v. Rubidge*, 229.

ELECTION OF REMEDIES.

Heir—Liability for Debts of Ancestor—The sole heir of the decedent is appointed administrator upon his estate, and by conveyances and transfers from those in whom the legal title is vested, acquires title to, and possession of the whole estate of the decedent, which greatly exceeds in value the liabilities of the deceased. Claims are presented against the estate in due season. The administrator resigns and the claims are not allowed. The heir is liable to the action of the creditor though the administration is not closed.

It rests with the creditor in such case to proceed in the administration proceedings or by independent action against the heir.—*Brown-Eastes v. Walley*, 170.

EQUITY.

1. *Reformation of Writings—Mutual Mistake*—Harris, managing an establishment known as "The EXPOSITION," applied for insurance upon the merchandise and fixtures therein, the property of one Arkush, as well as upon certain household goods therein, his individual property. Under the instructions of the insurer's agent he made a single application in the name of "The EXPOSITION, Ernest Harris, Mngr.," specifying the goods insured, the insurance on each, but not alluding to the separate ownership. This application being forwarded, by the agent, without explanation, the policy was issued to Harris, describing both his goods and those of Arkush. Harris being unfamiliar with business and business forms, accepted the policy with only a casual examination of it, and paid the premium. In framing the policy the company inserted the name of Harris as the insured, deliberately, and of set purpose, because under its by-laws, it was required that only individuals could be insured, who thereby became members. *Held* that nevertheless, giving the policies this frame must be deemed a mutual mistake, repugnant to the real intent of the parties, to-wit, the indemnification of both Harris and Arkush against loss upon their separate individual properties, and that equity might reform the policy so as to make it express the real intent.—*Merchants Co. v. Harris*, 103, 104.

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EQUITY—Continued.

Judgment, as at law, was given upon the policy as reformed, in the same action.—*Id. Ibid.*

2. *Maxims—Coming with Clean Hands*—To deprive the complaining party of equitable relief evil practice in the very matter in respect to which redress is sought must be shown. Equity does not repel all sinners.—*Kirby v. Union Pacific Co.*, 525.

ESTOPPEL.

1. *By Conduct*—One who in applying for insurance makes full and truthful disclosure of the state of the title of the property insured, and in framing the application acts under the directions of the soliciting agent of the insurer, and afterwards accepts the policy transmitted to him, and pays the premium thereon, is not estopped to demand a reformation of the policy, where in fact, it fails to conform to the application in respects which did not attract his attention, upon receiving it.—*Merchants Co. v. Harris*, 114.

A railway company applied for an injunction to restrain the habitual, wrongful purchase and sale by ticket brokers of its non-transferable tickets. That the plaintiff had on previous occasions sold like tickets to the defendants and connived at the sale thereof by defendants to others, was held no bar to the relief prayed, each sale of such non-transferable tickets being a new and independent wrong, distinct from former transactions.—*Kirby v. Union Pacific Co.*, 522-526.

That the railroad company had for a long time patiently suffered the wrongful conduct of defendants, no evidence of good faith on the part of defendants being given, and it not appearing that defendants conduct had in any manner been changed, or that defendants had been in any degree misled by anything done or omitted by the railroad company, was held no estoppel.

The doctrine of equitable estoppel is never available to sustain crime, fraud, or active misconduct of any character.

No defense to the plaintiff's action was presented by the doctrine of laches and acquiescence.—*Id.*, 526-534.

EVIDENCE.

1. *Presumptions*—Nothing appearing to the contrary it will be presumed that every officer performs his duty.—*Empire Co. v. Coldren*, 120; *People v. Hard Land Co.*, 267-268.

It being the duty of the treasurer to execute a certificate of purchase to each purchaser, at the conclusion of the tax sale, it

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will be presumed, the date of a certificate not appearing, that it was executed at the conclusion of the sale mentioned therein.—*Empire Co. v. Coldren, supra.*

The fact that the State Land Board approved a sale, though made at a distance from the state capital, and issued a certificate of purchase thereon, was held conclusive that the sale was directed to be made as it was in fact made.—*People v. Hard Land Co., supra.*

2. *Judicial Notice*—It seems that the court will judicially notice the volume of water necessary to irrigate eighty acres of land; and that forty-seven cubic feet of water per second of time, is not required for the irrigation of six hundred and forty acres.—*Weldon Valley Co. v. Farmers Pawnee Co.*, 550.

3. *Burden of Proof*—Under Rev. Stat. sec. 4518, the drawer and payee of an acceptance obtained by his fraud, acquires no title, and under Rev. Stat. sec. 4522, the burden is upon the endorsee to show that he acquired the paper before maturity, in good faith, and for value.—*Johnson County Bank v. Gregg*, 362.

4. *Competency—View*—Where in a prosecution for the sale of liquor to a minor, the evidence as to the age of the alleged minor is in conflict, the jury may take into consideration his size and appearance; but where such appearances are to be considered they should be detailed in testimony which can be preserved in the record.—*Quinn v. People*, 353.

Doubted if the omission of such testimony, or the preservation thereof in the record, would be error, where the attention of the jury is called to the appearance of the alleged minor, as evidence of his minority.—*Id.*, 352.

But where no evidence at all is offered upon the question of age, and the attention of the jury has not been directed to the appearance of the witness, for that purpose, a conviction can not stand.—*Id.*, 353.

In an action upon a bill of exchange given for goods sold, the plaintiff being an endorsee, and fraud in procuring the acceptance and that plaintiff is a mere agent and representative of the payee, being pleaded, false representation of the drawer's agent inducing the sale are admissible.—*Johnson County Bank v. Gregg*, 363.

All the details of the transaction may be put in evidence as pertinent to the allegation of fraud.—*Id.*, 362.

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EVIDENCE—Continued.

In an action against a street railway company, by a passenger, for negligently setting in sudden and rapid motion the car into which plaintiff was attempting to enter, throwing him to the ground, evidence of a similar accident and injury to another passenger attempting to enter the same train, only a few moments before the accident to plaintiff, and attributed to similar negligence and reckless conduct on the part of those in charge of the train, was held incompetent, as directed to immaterial matter and raising collateral issues, which the defendant might not be prepared to meet.—*Denver Co. v. Cowan*, 71.

5. *Relevancy*—Plaintiffs, doing business in Denver, drew a draft upon another house of the same name, but different membership, in Kansas City, in favor of defendant, and the Kansas City house paid it. Plaintiff sued to recover the amount, claiming that it was a loan to defendant. Defendant resisted the action on the ground that, in drawing the draft, plaintiffs were acting as agents of the drawees. Evidence of the agency, and the ratifications of the act was produced. *Held* that, to sustain their contention it was proper to permit defendants to prove a custom that a representative should draw drafts on his principal.—*Knollin v. Western Co.*, 358.

Action by the parent for the death of a minor child by his falling into an abandoned shaft the cover of which was defective. Evidence that the mother has warned the child not to go upon the cover of the shaft was *held* relevant to the question of whether the parents had been negligent in caring for the child.—*Richardson v. El Paso Co.*, 455.

6. *Res Gestae*—Declarations of the person whose murder is charged, made at a time which is not fixed but subsequent to the commission of the injury, and which are merely expressions of his or her opinions as to the guilt of the accused are not *res gestae.—Ehrhardt v. People*, 206.

Res Gestae—May be broadly defined as something incidental to the main fact and explanatory of it, including acts and words so closely connected with it as to constitute part of it, and without a knowledge of which the main fact may not be properly understood—events themselves speaking through the instinctive acts and words of the participants in the transaction, growing out of the main facts, and contemporaries with it.—*Denver Co. v. Brumley*, 254.

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EVIDENCE—Continued.

The declaration of the conductor of a street car made in the act of assisting to her feet a lady who had just been thrown from his car, that "the accident was not due to his fault, that the motorman started without a signal"; and his question to another passenger "Did you notice that the car started before I rang?" were held clearly admissible as verbal acts, part of the transaction, and serving to illustrate, explain and interpret it.—*Id.*, 258.

One offering a statement made out of court, as part of an act or transaction must establish the preliminaries necessary to show that it is in fact part of such transaction.—*Salas v. People*, 462.

One indicted for murder offers to prove a statement touching the affray, made by the deceased some hours after he had received the wound of which he died. There was no evidence of what had transpired during this interval. The statement was *held* narrative merely, and not *res gestae*.—*Id.*, 464.

7. *Sufficiency*—That in an action in the courts of Colorado, upon certain promissory notes, by the guarantors thereof, to whom they have been assigned, one of the notes is designated as "Ex. 6," is no evidence that such note is identical with one referred to in the complaint in a former action in one of the courts of Utah, and there designated as "No. 6," and alleged to have been paid.—*Cone v. Eldredge*, 573.

Defendant having an interest in an irrigating ditch, participated in the organization of a corporation in the articles of association of which the same ditch was described, and it was set forth that the purpose of the parties was to protect their rights in the same ditch. He became a director and officer of such corporation, and a priority was awarded to the corporation in respect to the same identical ditch. These circumstances were held sufficient to exclude all inference of a retention by the defendant of an individual and separate interest in the ditch, and to overcome his affirmative evidence of such retained interest.—*Reno v. Reno & Juchem Co.*, 592, 593.

8. *Action of Executive Boards*—Where no statute requires it the action of a board need not be evidenced by record.—*People v. Hard Land Co.*, 266.

9. *Variance*—Where, in an action for personal injuries, the plaintiff, both by pleading and bill of particulars describes his injuries with particularity, he is not to give evidence of injuries which are in no wise specified.—*Denver Co. v. Cowan*, 76.

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EVIDENCE—Continued.

Evidence that plaintiff since the injury, had been unable to attend to business was held properly admitted, as tending to show the extent of the injury. and its permanent character, even though the complaint made no claim for loss of time or interference with the plaintiff's business.—*Id.*, 76, 77.

10. *Witnesses—Experts*—A witness who has personal knowledge of particular lands, and from experience or observation knows what character of lands will, in that locality, yield a crop, and what will not, is competent to express an opinion as to the value of such lands.—*Mountz v. Apt.*, 494.

So a farmer who has lived in the vicinity of particular lands for several years, and has platted and sold land in that neighborhood.—*Id.*, 495, 496.

11. *Party As Witness—Manner in Testifying*—In a criminal prosecution the accused is sworn in his own behalf. The jury may consider his manner in testifying and demeanor upon the stand in determining the weight to be accorded to his testimony, and it is proper to so instruct. *Boykin v. the People*, 22 Colo. 496, followed. *Epley v. People*, 507.

12. *Bias of Witness*—An accused person is entitled to show an unfriendly disposition on the part of a witness for the prosecution, and threats made by such witness against him. The exclusion of such evidence is error. That the witness whose animus is so in question is declared by the trial judge, in refusing a new trial, to have disclosed by her acts and demeanor on the stand, the malignity attributed to her is not sufficient, on error brought, to warrant affirmation of the conviction. The demeanor of the witness cannot be presented in the record, and it is not to be said that the jurors and the trial judge were of the same mind as to the matter.—*Trozzo v. People*, 330, 331.

The error was aggravated by afterwards permitting the prosecution to show the friendly disposition towards the accused of a witness sworn in his behalf.—*Id.*, 332.

EXECUTORS AND ADMINISTRATORS.

Exhibition of Claims—Judgment had been recovered upon certain promissory notes against the guarantors thereof. *Held* that the judgment having been discharged by the guarantors the notes, which were the foundation of the judgment, were properly exhibited as a claim on their behalf against the principal maker. —*Cone v. Eldredge*, 570.

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FIXTURES.

Definition—Concentrating Tables, in a mill for dressing ores, secured to supports resting upon or attached to the foundation of the mill, and which are held in place by uprights firmly secured to the building, fed with water by pipes fastened to the building, and operated by machinery which is part of the mill, the tables being necessary to the complete and efficient character of the mill, as such, are parcel of the realty.—*Mollie Gibson Co. v. McNichols*, 58, 59.

The manner in which the owners made return thereof to the assessor, for taxation, or that the assessor designated the machinery of the mill as personalty, is immaterial.—*Id.*, 59.

And an agreement between the two mining corporations which erected in the mill, that either, ceasing to use it, may remove the machinery belonging to it exclusively, or, on certain conditions, machinery owned jointly, does not affect the question, until, at least, the stipulated condition has arrived.—*Id.*, 59.

FORCIBLE ENTRY AND DETAINER.

1. *Answer—Equitable Defenses*—Under the statute, (Rev. Stat. sec. 2612, 2603, cl. 6,) equitable defenses may be interposed in the action of wrongful detainer.—*Adcock v. Lieber*, 375.

2. *Judgment*—Specific performance of a verbal agreement to execute a lease of lands can not be had in an action for the wrongful detainer of the lands.—*Adcock v. Lieber*, 375.

FRATERNAL SOCIETIES.

Benefit Certificate. See LIFE INSURANCE.

FRAUDULENT CONVEYANCES.

Goods remaining with vendor. See CHATTEL MORTGAGE.

GUARANTY.

Distinguished From Suretyship—The surety is primarily liable upon the same contract with the principal. The guarantor is bound for the performance, by the principal alone, of a collateral contract, from which the guarantor's undertaking is separate and distinct. The guarantor's discharge of his obligation does not extinguish that of the principal, to which the guaranty relates. Therefore upon payment by the guarantor of a promissory note guaranteed by him, he becomes entitled to its possession, and to maintain an action upon it against the maker.—*Cone v. Eldredge*, 569.

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HABEAS CORPUS.

Where the Writ Lies—The omission from a criminal information, otherwise above exception, of the concluding phrase "and against the peace and dignity of the same," goes to matter of form, and in no degree impairs the jurisdiction of the court.—*Chemgas v. Tyman*, 37.

One convicted upon such information will not be discharged on *habeas corpus*.—*Id.*, 37.

Operation of the Writ—The writ operates upon the person of the respondent found within the jurisdiction, and he may be compelled to produce a child which is in his custody, though without the jurisdiction.—*Breene v. Breene*, 345.

And the child being brought before the court, may be disposed of, according to what may appear to be for the interest of the child.—*Id.*, 345, 346.

HEIR.

Liability for Debts of Ancestor—The sole heir of the decedent is appointed administrator upon his estate, and by conveyances and transfers from those in whom the legal title is vested, acquires title to, and possession of the whole estate of the decedent, which greatly exceeds in value the liabilities of the deceased. Claims are presented against the estate in due season. The administrator resigns and the claims are not allowed. The heir is liable to the action of the creditor though the administration is not closed.—*Brown Eastes v. Walley*, 169, 170.

HUSBAND AND WIFE.

Rights as to custody of children. See PARENT AND CHILD.

INFANTS.

Age of Discretion. See CONTRIBUTORY NEGLIGENCE.

INHERITANCE TAX.

Appointment of Appraisers—Under Rev. Stat. sec. 5561, where one appointed to appraise the estate of a decedent, in order to determine the inheritance tax, has made an incomplete and unsatisfactory report, the county court has jurisdiction to remove such appraiser and appoint another in his stead, because otherwise the first appointee by returning inadequate reports might frustrate or interminably delay the proceedings. The question is for that court and its action is not a ground of complaint by the heirs or administrator of the decedent.—*County Court v. Watson*, 408, 409.

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INJUNCTION.

1. *Protection of a Lawful Business Against Unlawful Interference*—One who prosecutes a lawful business has a property therein, and is entitled to protection against unlawful interference therewith.—*Kirby v. Union Pacific Co.*, 515

A railroad company had for a long time, issued tickets entitling the holder to proceed to destination and return, for a single fare. These tickets were expressly declared, upon the face thereof to be non-transferable.

The defendants were engaged in the purchase of the portion of these tickets entitling the holder to return, and the sale thereof to strangers, whom they instructed to falsely impersonate the original purchaser. They declared their purpose to continue in this course of illicit dealing. By this abuse of the ticket, practically impossible to detect, and by the frauds so habitually practiced, the railway company was deprived of enormous gains to which it was entitled. *Held*, that on the ground of constantly recurring wrong, the avoidance of a multiplicity of actions, and irreparable injury, a clear case for injunctive relief was presented.—*Id.*, 521, 522.

2. *Interference With an Irrigating Ditch*—Restrained by injunction.—*Reno v. Reno Juchem Co.*, 591.

3. *Preliminary—Affidavit*—If the defendant against whom a preliminary injunction has been issued without notice, no emergency existing, would avail himself of the final proviso of sec. 148 of the code as amended by the act of 1903 (Laws 1903, c. 117, Rev. Code sec. 164), he must move in the trial court. Failing in this he will not be heard to make the objection in the court of review.—*Kirby v. Union Pacific Co.*, 543.

The record held to show an emergency, within the meaning of the statute entitling plaintiff to a preliminary injunction without notice.—*Id.*, 544.

INSTRUCTIONS.

1. *Construction*—Instructions are to be taken as a whole. A partial and insufficient statement of the law in one point of the charge may be supplemented by what is set down in another. —*Starrett v. Ruth*, 586.

2. *Construed*—In an action by servant against master for an injury attributed to the defective conditions of the place of employment, the complaint set up and relied upon a promise to repair. The answer denied the promise and alleged contributory negligence and assumption of risk by the servant. An instruc-

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tion that the burden of proving the servant's assumption of risk was upon the master was held error as permitting a verdict for the plaintiff, even though the promise to repair had not been established.—*Colorado Co. v. Reynolds*, 237.

3. *As to Evidence*—Where in an action upon a promissory note the defense is fraudulent alteration, instructions which make it plain to the jury that they can find for the defendant only upon a clear satisfactory preponderance of the evidence are sufficient.

The refusal of instructions prayed which announce that the evidence must be "strong," "convincing," "indubitable," and the like, is not error.—*Brunton v. Ditto*, 180.

4. *Misleading—Not Applicable to the Evidence*, are misleading and should not be given.—*Metallic Co. v. Watson*, 286; *Knollin v. Western Co.*, 357, 358.

5. *Negligence*—Particulars of negligence alleged as to which there is no evidence should be excluded from the consideration of the jury; but this may be effected by the general charge specifying what is to be determined by the jury.—*Denver Co. v. Cowan*, 80.

An instruction which called the attention of the jury to particular negligences charged, as to which there was evidence, and told them that before they could find for the plaintiff, they must believe from a fair preponderance of the evidence, that the conditions enumerated resulted "solely from the negligence of the defendant" was held not improper, as excluding from the jury the question whether the act complained of was negligence. —*Id.*, 80.

6. *As to Interest, of Party Testifying*—The interest of each and every witness in the subject matter of the litigation is to be considered by the jury in weighing his testimony, and it is the duty of the Court to so instruct.—*Id.* 78.

A general instruction, as to all witnesses, applies to the parties, and complies with the rule.—*Id.*, 78.

7. *As to Damages*—In an action for personal injuries an instruction that the amount to be awarded, if the jury should find for the plaintiff, was "left to the enlightened judgment of the jury," that they were to consider plaintiff's expectancy of life, his physical pain, his mental suffering, the probability of its continuance. the nature and extent of the injury, as appearing in the evidence, and from all these determine what will be a fair compensation for the injuries sustained, was held to accord,

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INSTRUCTIONS—Continued.

substantially, with the instruction approved in *Denver Co. v. Martin*, 44 Colo. 324.—*Id.*, 81.

8. *Non-Direction*—Is not error unless the proper instruction is presented and refused.—*Mountz v. Apt*, 498.

INSURANCE.

1. *Soliciting Agent Represents Insurer*—The agent of an insurance company preparing an application for insurance represents the insurer, and the knowledge which he acquires in the premises is the knowledge of the company.—*Merchants Co. v. Harris*, 103, 104.

2. *Title of Insured*—Where chattels owned in severalty by two parties, are, upon application by one of them, insured as the property of that one alone, and are at the time under mortgage, of which no mention is made in the application or policy, but the agent of the insurer has at the time explicit information of the separate ownership of the chattels, the policy is not avoided, even though it expressly provides that it shall be void, "if the interest of the insured be other than unconditional and sole ownership * * * or be or become encumbered by chattel mortgage."—Id., 109.

3. *Application—Question Not Answered*—Where one of the questions set down in the printed form of application for insurance is not answered, or is answered imperfectly, it is the duty of the insurer, if more specific information is desired, to apply for it before issuing the policy. The acceptance of such imperfect application, and issuing the policy, is a waiver of the imperfection.—*Id.*, 112.

4. *Condition Against Encumbrance*, applicable to the insured property as an entirety, is not broken by the encumbrance of a part only.—*Id.*, 112.

5. *Conditions Known to Agent*, and by which the policy is made void from the beginning, are waived, when the state of facts leading to this result is known to the soliciting agent at the time of accepting the application.—*Id.*, 113.

JUDGE.

Judge's Chambers—Must Be Located Within the District—Under sec. 471 Rev. Code (sec. 436 Mills Code), a judge may make orders, and exercise judicial authority, only when sitting in court, or at his chambers; and under Rev. Code secs. 443, 444, (Mills Code secs. 408, 409), the chambers of a district judge must

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JUDGE—Continued.

be located within his district. An attempted exercise by a district judge, of judicial authority, in a matter pending in, or pertaining to, the courts of his district, at a time when he is outside of his district, is without warrant of law and void.—*Kirby v. Chicago Co.*, 85, 88.

To present to a judge an affidavit of the facts constituting a contempt, as required by the code (Rev. Code sec. 356, Mills Code sec. 322) is to lay it before him for judicial consideration and action. This is the first step in the proceeding against the contemnor. and the presentation must be made at a place where judicial consideration and action may lawfully ensue. Until this is done the proceeding cannot be said to have commenced, or the charges to have been made; therefore a warrant for an attachment for an alleged contempt, issued by a district judge while he is absent from his district, though within the state, upon affidavits presented to him while so without his district, is a nullity, and should be quashed upon motion.—*Id.*, 90.

JUDGMENT.

1. *Record—Conclusive Effect*—Where the judge of the court below finds and declares that the bill of exceptions was tendered within the rule. this finding will be accepted as conclusive in the court of review.—*Denver v. Rubidge*, 226.

So his certificate that the bill of exceptions contains all the evidence.—*Id.*, 227.

2. *Foreign Judgment—By Confession—Effect*—A judgment entered in a court of general jurisdiction of another state, by the clerk of that court, in vacation, upon a promissory note with a power of attorney appended authorizing such confession, the note being executed in the foreign state and payable there, and the power of attorney being valid, and the judgement authorized by the laws of that state, must, when a copy of the record authenticated according to the act of congress is presented in the courts of Colorado, be accorded full faith and credit, even though the defendant was a resident of Colorado and was not served with the process.—*Vennum v. Holmberg*, 309, 310.

3. *Collateral Attack—Habeas corpus* by a convict seeking discharge, on the ground of an alleged fatal defect in the information upon which he was convicted. is a collateral assault on the judgment of conviction.—*Chemgas v. Tynan*, 37.

4. *Reinstatement on Error*—A judgment given in the district court and there afterwards vacated, upon alleged cause

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JUDGMENT—Continued.

shown, within the time allowed by law, will not, no abuse of discretion being shown, be reinstated on error brought.—*Vennum v. Holmberg*, 308.

5. *Satisfaction—Effect*—Judgment against two, is satisfied by the guarantors of the notes upon which the judgment is founded. The executrix of one of the makers is liable to the guarantors, for the full amount so expended.—*Cone v. Eldredge*, 571.

6. *Relief—Writing Reformed and Judgment Thereon*—A policy of insurance was reformed, and judgment given thereon as reformed, in the same action.—*Merchants Co. v. Harris*, 95.

JUDGMENT.

Vacating. See PRACTICE.

JURY.

1. *Challenge for Cause*—In the action of a servant against master for an injury attributed to the negligence of the latter, one called as a juror and examined on the *voir dire*, testified that he entertained a natural sympathy for a laboring man; that if the evidence was clear this would make no difference with him; that he would try the case entirely upon the evidence and the instructions of the court, allowing nothing else to influence him; but that it would require perfectly clear evidence to overcome his feeling for the laboring man. *Held*, that a challenge for cause should have been sustained.—*Metallic Co. v. Watson*, 286.

2. *Trial By—Equity Causes*—In an equity cause neither party is entitled to a trial by jury. If in such a cause a jury is empanelled, the court may of its own motion, after evidence has been heard, discharge the jury and make its own finding.—*Selfridge v. Leonard-Heffner Co.*, 316.

JUSTICE OF THE PEACE.

1. *Jurisdiction—Partnership Accounts*—A justice of the peace has no jurisdiction to settle the accounts of a partnership.—*Starrett v. Ruth*, 584.

Ambiguous testimony held to establish that, as to a portion of the claim asserted by plaintiff, it arose out of partnership transactions.—*Id.*, 584.

2. *Appeal—Effect*—Where in an action before the justice of the peace, an attachment is issued and levied, and a forthcoming bond given by the defendant a judgment of the justice dissolving the attachment is not final. An appeal taken and perfected

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JUSTICE OF THE PEACE—Continued.

in due season in the main cause, keeps the attachment in force, and brings this ancillary proceeding into the county court as an incident; and if in the county court the attachment is sustained and judgment given for the plaintiff the sureties in the forthcoming bond are liable.—*King v. Watson*, 295, 296.

LANDLORD AND TENANT.

Tenant Holding Over—Acceptance of Rent—Effect—If the tenant for a term of years holds over after the expiration of his term the landlord may eject him as a trespasser, or may waive the wrong and treat him as a tenant, at his election, either for years or from month to month. The character of the tenancy depends on the will of the landlord, and not upon that of the tenant; but if the landlord would create a tenancy other than that from year to year his purpose in that behalf must be declared at the time.—*Hallett v. Barnett*, 434.

An intention not expressed is without effect.—*Id.*, 434.

LIFE INSURANCE.

1. *Authority of Local Solicitor*—The local solicitor is the agent of the insurer to fix the amount of the premium. His action binds the company.—*New York Co. v. Pike*, 250.

His knowledge is the knowledge of the company.—*Merchants Co. v. Harris*, 103, 104

2. *Benefit Certificate in Fraternal Society*—A fraternal order, the death of a member in which entitles his surviving kin to certain benefits, is, for the purpose of determining who is entitled to the benefit, treated as a mutual insurance company, and the certificate of membership as a policy of life insurance, and, so far as possible, as the last will of the member. The policy measures the rights of the parties. The beneficiaries take thereunder, and not by inheritance.—*Mund v. Rehaume*, 134, 135.

3. *Construction*—Where no beneficiary is named in the certificate the member is deemed to accept as the beneficiary thereunder, those designated in the constitution of the order, and this is to be construed according to the ordinary and common use of the words found therein. Technical definitions are not controlling. Therefore where the constitution of the order provided that if the member left no widow, child, or grandchild, the benefits should be paid "all to one parent if only one is living." *Held*, that the father was the beneficiary, though by the law of the domicile the marriage, of which the deceased was begotten,

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LIFE INSURANCE—Continued.

was absolutely void. The incapacity of the son to transmit to the father was held not the test.—*Mund v. Rehaume*, 135.

3. *Beneficiaries*—Who are eligible as beneficiaries is determined by the laws of the state where the society is organized.—*Id.*, 136.

4. *Delivery of Policy*—A policy of life insurance may be delivered, in point of law, though it never comes to the hands of the insured.

Defendant was a life insurance company of the State of New York doing business in Colorado, with its principal office, in this state, in Denver. It was its custom to accept for the first premium, the promissory note of the applicant for insurance, and to deliver the policy without refernce to the maturity or payment of the note, and to look to the local solicitor of the company for the payment of the first year's premium. Cartee, being informed of this custom applied for insurance upon his life, executing a promissory note, payable to the local solicitor, in three installments for the first year's premium. Cartee was a resident of Victor in Teller county. The local solicitor conforming to the rules of the company, transmitted the application with the note, to the Denver office. Thence the application was sent to the home office, and a policy, naming the wife of the applicant as beneficiary was issued thereon and sent to the Denver office, without instructions. So far all that was done was in conformity with the custom in like cases theretofore. But in this instance, the local solicitor being delinquent, the policy was detained in the Denver office for some days, and was then sent to a bank at Victor with instructions to return it if the first installment of the note should not be paid when due. Cartee died before the first installment of the premium matured. Up to the time of his mortal illness he had been in good health. The policy was then returned to the Denver office, and was never in fact delivered, nor ever came to the hands of the insured or the beneficiary. *Held* that in view of the invariable custom under which the company had conducted its business theretofore, that this custom was brought to the attention of Cartee, that his application was made with reference to it, that the application contained no provision that any premium must be paid before the policy took effect, or that the policy must actually come to the hands of the insured in his lifetime, the policy was, in contemplation of law, delivered when it was mailed from the home office of the company, that the agent at Denver received

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LIFE INSURANCE—Continued.

it charged with the duty to deliver it to the insured, that the contract was then complete, and the act of the agent in Denver in detaining it was without effect to impair it.

The right of the beneficiary rested upon contract and not upon any estoppel.—*New York Co. v. Pike*, 250.

Held further that the return to the beneficiary of the premium note, with an endorsement, contrary to the fact, that the application had never been accepted was without effect.—*Id.*, 246.

5. *Conditions*—A condition in an application for life insurance that the insurance shall not take effect unless the policy is delivered to the insured while he is in life and good health, is a valid condition.—*New York Co. v. Pike*, 244.

LIMITATIONS.

1. *At What Time the Statute May Be Pleaded*—A foreign corporation not having paid the tax required by the statute institutes an action in defiance of the prohibition contained in Rev. Stat. sec. 904. Its right to sue is promptly questioned. The whole period of the statute of limitations is permitted to run, without payment of the tax. The defendant then pleads the statute of limitations. The plea is in time, and could not have been pleaded at an earlier date.—*Western Co. v. Pickett*, 424.

2. *How to Avail of the Statute—In an Action for a Penalty*—A general denial presents the defense of the limitation prescribed by Rev. Stat. sec. 4068.—*Western Co. v. Pickett, supra.*

3. *Suspension of Statute by Suit*—Under Rev. Stat. sec. 904 the attempted institution of an action in the courts of Colorado by a corporation organized under the laws of another state, which has not paid the privilege fee imposed by the statute, has not the effect to stay the course of the statute of limitations. When the statutory period has elapsed the action is barred even through during the whole of that period the action appeared upon the docket of the court as a pending action, and the corporation afterwards paid the tax.—*Western Co. v. Pickett*. 420-424.

MANDAMUS.

1. *To Judges of Election*—In the interpretation of the ballot by what appears upon its face, the actual count thereof, and the determination of the result, the judges of an election, act judicially, and proceeding in good faith, are not controlled by mandamus.—*Leary v. Jones*, 198.

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MANDAMUS—Continued.

But their duty to count the ballots, and afterward make return of the result is entirely ministerial, and mandamus will lie to compel its performance.—*Id.*, 198.

Adjournment of the Board—Effect—The adjournment of the judges, and their separation, is no answer to a mandamus to compel them to return the result of their count of the ballots; they may be compelled to re-assemble.—*Id.*, 199.

2. *Answer*—Where upon mandamus against two of the judges of an election, to compel them to certify to the result, the answer by its silence admitted the counting of the ballots by the three judges, and that if the result, as so ascertained, had been certified, it would have shown the election of the petitioner, an averment that only a certain number of votes were cast, and that upon opening the ballot box after the close of the election a much greater number of ballots was found therein, in the exact similtude of the official ballot, was held to present no defense.—*Leary v. Jones*, 200.

3. *Parties*—A defect of parties which is injurious only to the petitioner does not avail the respondent.—*Leary v. Jones*, 200.

4. *Judgment*—Where the pleadings show that, complying with the law, only a certain return can be made, it is proper to command the judges to sign and certify such return.—*Leary v. Jones*, 200.

MASTER AND SERVANT.

1. *Master's Duty as to Place of Work*—Where the servant's employment is that of making a dangerous place safe the rule that the master must provide him a safe place in which to work has no application, e. g. where an experienced miner, familiar with all the dangers of the employment and the condition of the mine is set to timber an unsafe place in order to future safe working therein. In such case the servant knowing the danger, there being no negligence on the part of the master, assumes the risk.—*Metallic Co. v. Watson*, 284.

One operating a lode mine must use reasonable care to see that the lagging upon which the miner may be required to walk, in going about the mine, is in safe condition. He is liable in damages for injuries to an employe occasioned by any defect in the material or construction thereof which might have been avoided by the exercise of ordinary care. The facts examined and the case held not to be within the exception which controls where the servant is employed to make a dangerous place safe.—*Jackson v. Yak Co.*, 557, 558.

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MASTER AND SERVANT—Continued.

2. *Non-Delegable Duties of Master*—The obligation of the master to use reasonable care in respect of the appliances furnished for the use of the servant cannot be delegated, so as to absolve the master from responsibility for negligence in this regard.—*Jackson v. Yak Co.*, 561.

3. *Vice Principal*—Knowledge on the part of the agent who timbers the mine, is the knowledge of the mine owner. If defective or unsuitable timber is used, and by reason of this defect an injury afterwards occurs to a miner, the master is not exonerated by the claim that at the time of the injury he had no knowledge of the condition of the structure.—*Jackson v. Yak Co.*, 557, 558.

4. *Servant's Assumption of Risk*—The servant does not assume extraordinary risks occasioned by the master's negligence, unless the danger is an open and visible one, or the servant has knowledge of it.—*Jackson v. Yak Co.*, 561.

5. *Contributory Negligence of Servant*—A timber man employed in a lode mine, having occasion in the discharge of his duties to walk upon the lagging of a drift is entitled to assume that it was constructed of proper material and in a proper manner.

At the most, he is not required to do more than to examine the surface, restore any of the sticks which may be out of place and use reasonable care in making the passage.—*Jackson v. Yak Co.*, 559. 560.

6. *Contributory Negligence of Servant*—The promise of the master to correct a defective condition in the place of the servant's employment does not excuse the latter from the exercise of due care for his own safety, during the time allowed for reparation. If by reason of his own failure in that behalf, during such period, he receives an injury which would not have happened to him but for such neglect, he will not be allowed an action against the employer.—*Colorado Co. v. Reynolds*, 234.

Plaintiff was employed in defendant's pump-house. It was his duty, from time to time, to clean the air compressor. Around the air compressor was a narrow walk of cement, upon which oil escaping from the machinery would collect. There was no drip-pan to collect this oil, nor any guard-rail about the compressor. The presence of oil on the cement walk rendered the performance of the servant's duty a dangerous one. He knew the danger, appreciated it, and had repeatedly complained of it. The oil might easily be removed by sprinkling it with fine dust,

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MASTER AND SERVANT—Continued.

and then sweeping the dust. Plaintiff, in order to clean the compressor, assumed a stooping posture close to it, with one foot on the cement walk so covered with oil, and the other upon the bed of cinders which composed the rest of the floor. In rising after the completion of his task his foot slipped upon the oily surface of the cement, and he fell upon the moving machinery, receiving injury. *Held* that his failure to first remove the oil was negligence contributing to his injury, and defeated his action; that during the process of wiping, if he had covered the oil with dust, oil would have settled upon the cement was held not to take the case out of the rule that for the servant to adopt the more dangerous of two methods open to him, in performing his work. is negligence.—*Id.*, 234-237.

MAXIMS.

Where upon special execution issued from the county court, upon a judgment for the plaintiff, upon an appeal from a justice of the peace, neither the defendant nor the attached goods are found, the plaintiff may have his action against the sureties in the forthcoming bond, though no demand is averred.—*King v. Watson*, 297.

The law does not require impossibilities.—*Id.*

Nor things which are unreasonable.—*News Times Co. v. Doolittle*, 398.

MECHANICS LIENS.

Action to Enforce—A Proceeding in Equity—An action to foreclose a mechanics lien is equitable in its nature and controlled by the rules of chancery practice.—*Selfridge v. Leonard-Heffner Co.*, 316.

Cross Complaint Demanding Damages, for the violation of the contract upon which plaintiff's action is grounded does not change the character of the action to one at law.—*Id.*, 316.

MUNICIPAL CORPORATIONS.

Implied Powers—A municipal corporation which has title to the works by which its inhabitants are supplied with water, has implied power to make reasonable regulations for the protection of such works.—*Greene v. Loveland*, 595.

NEGLIGENCE.

1. *Definition*—Ordinary care is that degree of care which an ordinarily prudent person would exercise under similar circumstances.—*Michigan Co. v. Pueblo Co.*, 165; *Richardson v. El Paso Co.*, 450.

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NEGLIGENCE—Continued.

The evidence examined and held to disclose a want of ordinary care on the part of plaintiff, in performing its duty as bailee.—*Id.*, 165.

2. *Violation of Statute*—The failure to perform a duty imposed by statute for the protection of the public is negligence *per se.*—*Richardson v. El Paso Co.*, 449.

NEGOTIABLE INSTRUMENTS.

Endorsee Without Consideration—Defenses—In an action upon an accepted bill of exchange, by endorsee, an answer showing fraud of the drawer and payee, in procuring the acceptance, and that the endorsee is not a holder in good faith, but a mere agent or representative of the drawer, lending its name to assit in the consummation of the fraud, states a defense.—*Johnson County Bank v. Gregg*, 360-362.

NOTICE.

False But Not Misleading—A statement in the advertisement of the sale of public lands which though false can mislead no one, will be disregarded.—*People v. Hard Land Co.*, 267.

To Agent Affects Principal—Notice to an agent during the transaction affects the principal.—*Merchants Co. v. Harris*, 107-113.

PARENT AND CHILD.

Custody of Children—The rule of the common law which gave to the father a right to the custody of the child superior to that of the mother, has been greatly relaxed. The paternal right is subordinated to the welfare of the child, and this, whether the father is or is not a suitable person to have its custody.—*Breene v. Breene*, 346.

The father and mother, residents of Colorado, were separated. A child of three years had been in the custody of the mother since their separation. The father in the absence of the mother secured possession of it and carried it to New York, where he left it in custody of a distant relative. In view of the fact that this entirely separated the child from both of the parents, and left it to be nurtured during its tenderest years among strangers, that the mother was financially of better ability than was the father, to provide for it, that the conduct of the father, in the manner of securing the custody of the infant, and disposing of it among strangers, gave occasion to question his solicitude for the welfare of the child, and that the disposition made by the father would entirely remove the child from the maternal

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PARENT AND CHILD—Continued.

affections and care, the court committed it to the mother.—*Breene v. Breene*, 346, 348.

2. *Parent's Right of Visitation*—In the same case, no application being made in the court below for permission to the father to visit the child, the court refused to reverse the final order for this omission. The court said that the affirmation of the order would not preclude the court below from making the proper order allowing such visits, or other order, from time to time, touching the custody of the child, as changing conditions might require or justify.—*Breene v. Breene*, 348.

PARTIES.

1. *Joinder of Plaintiffs*—Several guarantors of several promissory notes, of which defendant's testator and another were the makers, had become assignees of these notes. They were entitled to maintain a joint action thereon against the executrix; and it was held that in what proportion they had contributed to the payment or purchase of the notes was of no concern to the executrix.—*Cone v. Eldridge*, 570.

And though it appeared that the wives of some of these guarantors had united with them in mortgages, to secure the guaranty, and that another party, not otherwise connected with the transaction, had executed a similar mortgage, and that these securities were accepted and applied upon the notes, these circumstances were held insufficient to overthrow the presumption arising from the endorsement and delivery of the notes to the plaintiff.—*Id.*, 572.

2. *Joinder of Defendants—Joint Torts*—Two or more are not to be joined as defendants to an action for a tort, merely because each is liable therefor. The injury must be the result, in some sense, of their joint action, before they can be made jointly liable therefor.—*Stratton's Independence v. Sterrett*, 26.

Defect of Parties—Injurious only to the complaining party, will not avail the respondent.—*Leary v. Jones*, 200.

PARTNERSHIPS.

Two, of the Same Partners, constitute in law a single partnership. Either may maintain an action upon a contract made with the other, without an assignment.—*Michigan Co. v. Pueblo Co.*, 164.

PASSENGER CARRIER.

Non-Transferable Tickets—A railway company may lawfully issue tickets which are not transferable by the holder. The

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PASSENGER CARRIER—Continued.

condition which prohibits transfer is a legal contract, and the railway company is under no obligation to carry a person presenting such ticket, unless he is in fact the original purchaser.—*Kirby v. Union Pacific Co.*, 514.

Such tickets are not property in the hands of the purchaser in such sense that they can be sold. Dealing therein is a fraud both upon the railway and the traveling public and cannot be made a legitimate business.—*Id.*, 515.

A railroad ticket is a mere token to show that the person properly in possession of it has paid his fare. If transferred in violation of its terms, it is no longer property, in any sense, but as much under the ban of the law as counterfeit money.—*Id.*

PAYMENT.

Voluntary—A judgment creditor causes the judgment to be made a lien on the lands of the debtor. The debtor in order to be able to prosecute his business of dealing in lands pays the judgment. The payment must be regarded as voluntary. The conduct of the creditor is in no sense duress.—*Bull v. Doss Bros. Co.*, 460.

PLEADINGS.

Construction—A complaint against a mining corporation and two of its subordinate officers, for an injury to a common miner, attributed to the joint and concurring negligence of all the defendants, construed, and held to state no cause of action as against the defendants jointly.—*Stratton's Independence v. Sterrett*, 24, 25.

Where a complaint in the county court contains the averment required by the statute that the value or amount involved does not exceed $2,000, it is not to be said that it, upon its face excludes the jurisdiction of that court, even though the statutory averment as to the amount involved is preceded by an *ad damnum* clause, in $2,500.—*Dunkle v. French*, 173.

2. *Certainty—Things Implied From Things Averred*—What can be reasonably inferred from the averments of a pleading need not be expressly alleged. Action for the death of a child, by its fall into an abandoned shaft, alleged not to be sufficiently covered as required by the statute. The complaint named as defendant "The El Paso Consolidated Gold Mining Company" and averred that the shaft was situated upon the Australia Lode Mining Claim, in the Cripple Creek Mining District. *Held*, that inasmuch as it was apparent from the corporate name that the

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PLEADINGS—Continued.

defendant was engaged in mining for gold bearing ores, that the word "lode" is well understood to apply to veins of metallic ore, the complaint sufficiently disclosed that the shaft in question was upon a metalliferous mine.—*Richardson v. El Paso Co.* 445, 446.

3. *Amendments*—The trial court may in its discretion allow a replication to be filed after a motion for judgment for want of it, and after the jury are empanelled.—*Metallic Co. v. Watson*, 286.

The court should be liberal in allowing amendments, in the interest of justice; but the matter lies in the discretion of the trial court, and its action will not be reviewed unless an abuse of the discretion appears.—*Wiggington v. Denver Co.*, 379.

Where plaintiff at the conclusion of the trial below applies for leave to amend his complaint so as to abandon material allegations, but shows no cause for the application, and the application is denied, no court of review can determine that there was an abuse of discretion.—*Id.*, 380.

Where an amended complaint is filed, without opportunity to defendant to examine it in advance, and state his objections to it, a motion to strike is proper.—*Id.*, 380, 381.

4. *Motion for Judgment*—A motion for judgment on the pleadings cannot be converted into a demurrer to the complaint. —*Whitehead v. Johnson*, 587.

PRACTICE.

1. *Appearance*—An action in the county court was dismissed for non-appearance of the plaintiff. Plaintiff perfected an appeal to the district court. In that court the defendant, not limiting his appearance, interposed a motion to dismiss the appeal on the ground that the judgment of dismissal was merely interlocutory, and in effect a voluntary non-suit. so that no appeal lay and the district court was without jurisdiction.

Held, a general appearance.—*SilverMountain Co. v. Anderson*, 301.

2. *Motions—Construction—Waiver*—A motion to quash an attachment issued by a district judge, not sitting in court nor within his district, for an alleged violation of an injunction, set forth as grounds thereof (1) That the court had no jurisdiction to allow the injunction. (2) That plaintiff in the injunction suit had no capacity to maintain an action in Colorado. (3) That no affidavit had been presented to the judge, within the

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PRACTICE—Continued.

limits of the judicial district setting forth any facts as to the alleged contempt.

The assignment of the first two grounds of the motion was held no waiver of the last.—*Kirby v. Chicago Co.*, 90.

Motion to Strike Out Amendment—Where an amended complaint is filed, without opportunity to defendant to examine it in advance, and state his objections to it. a motion to strike is proper.—*Wiggington v. Denver Co.*, 90.

3. *Offer of Judgment*—Merchant sued upon a bill of exchange given for goods which he was induced to purchase, by false representations, offers to allow judgment for the return of the goods remaining unsold, and for the amount obtained by the sale of such part of the goods as has been sold. *Held*, a sufficient rescission.—*Johnson County Bank v. Gregg*, 363.

4. *Rules of Court—Effect*—The rules of this court have the effect of a statute. They are not to be ignored.—*Knudson v. Frost*. 341.

5. *Default—Vacating—Excusable Neglect*—A judgment is not to be vacated merely because a meritorious defense is shown. In the same case, on motion to vacate the judgment, it was held that inasmuch as the defendant knew nearly a month in advance that the cause was set for trial, his absence was not shown to be due to any mistake, surprise, inadvertence or excusable neglect; that as his private secretary who knew more of the case than defendant himself was present at the trial, and another witness was accessible, who had much information in regard to the plainiff's demand, it was an error on the part of the secretary and the attorney to retire from the case; that their action in the premises must be regarded as deliberate; and that none of the statutory grounds appearing (Rev. Code, sec. 81) the motion to vacate the judgment was properly denied.—*Bradbury v. Whitney*, 291, 293.

The provisions of the code for the vacation of judgments by default are to be liberally construed. The design of the statute is to call into exercise the equitable powers of the court. An action was instituted in El Paso County against husband and wife, upon certain joint promissory notes. Service was made upon both defendants by delivery to the wife of a copy of the summons and complaint, at tne joint residence in Fremont County. The answer was due on the 17th of August. The wife had no knowledge of the various transactions of which the promissory notes were a part, nor of what defense might be

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PRACTICE—Continued.

made to the action. The husband was then absent in the City of New York but his return was expected on or about the 10th of August. After this date the wife was informed that he would not return for a considerable time. and on the 13th she transmitted the papers to him, informing him of the service. The husband upon receiving the copy mailed them by special delivery letter to his attorney in Denver. instructing him to enter an appearance. The attorney failed to receive the papers until late in the afternoon of the 19th. A default was entered on the 18th, and on the 25th of August final judgment against both defendants for over Eleven Thousand Dollars. The husband upon being informed of the situation immediately returned to Colorado and an application by both defendants, to vacate the default and for leave to answer, was promptly interposed, supported by affidavits showing the facts, and exhibiting a meritorious defense. *Held* that in view of the manner of the service, the husband's absence, the short delay in defendant's appearance and that plaintiff was not prejudiced by it the neglect was excused as to the husband.—*Gumaer v. Bell*, 475, 479.

As to the wife it was held that in view of her inexperience in business, her ignorance of the defense, that she relied upon her husband in all business matters, that at the time of receiving the summons and complaint she justly expected her husband's speedy return, that her conduct was not different from what might be expected from any wife similarly situated, and considering also the large amount of the judgment, her default also was to be attributed to excusable neglect, and vacated.—*Id.*. 479, 480.

Affidavit—Meritorious Defense—To vacate a default a mere showing of excusable neglect is not sufficient.

A defense to the action *prima facie* meritorious, must also appear.—*Gumaer v. Bell*, 480.

And it must be stated with such fullness and particularity that the court can see that it is substantial, not technical, meritorious and not frivolous.—*Id.*, 480.

A defense to part of the cause of action is sufficient.—*Id.*, 480.

If it is made to appear that in justice to the defendant he is entitled to be heard this suffices. The case made held to be sufficient.—*Id.*, 481.

Discretion of the Court.—The discretion of the court in determining an application to vacate a default is not a capricious or arbitrary discretion, but is controlled by fixed legal principles,

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PRACTICE—Continued.

to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of justice.—*Gumaer v. Bell*, 486, 487.

Whenever the court of review, upon examination of the facts, is convinced that the action of the court below, in such case, was not in conformity with the spirit of the law its single duty is to vacate the erroneous judgment.—*Id.*, 487.

Conditions.—A judgment by default being reversed the cause was remanded with directions to the lower court to allow an answer to be filed within a reasonable time to be fixed by that court, and upon payment by defendants of all costs which had accrued in that court, to the day upon which the defendant's motion to vacate the judgment had been denied in that court.—*Gumaer v. Bell*, 487.

PRINCIPAL AND AGENT.

1. *Evidence of Agency*, may be circumstantial, *e. g.*, the recognition of the agency by the principal.—*Silver Mountain Co. v. Anderson*, 305.

2. *Notice to Agent.*—What is, at the time, known to the agent soliciting insurance, is known to the company.—*Merchants' Co. v. Harris*. 106.

3. *Liability of Principal.*—The principal is bound by the acts of the agent within his apparent authority, unless, the agency being limited, this is brought to the knowledge of those dealing with him. The evidence examined and *held* sufficient to support the judgment.—*Silver Mountain Co. v. Anderson*, 305.

PROXIMATE CAUSE.

The defendant induced the plaintiff's servant in charge of plaintiff's premises to leave them, and go to defendant's assistance. During the servant's absence a fire was kindled upon or near to plaintiff's premises, and was carried by the wind over his field, destroying the crop. *Held*, that neither the kindling of the fire nor the rising of the wind was occasioned by the servant's absence, and neither was the natural and legitimate sequence of such absence.—*Clark v. Wallace*, 439.

Public Lands. See STATE LANDS.

PUBLIC OFFICERS.

Definition—Every person elected to discharge a public duty who receives compensation for the same is a public officer. The county judge is within this category.—*Henderson v. County of Boulder*. 366.

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QUIETING TITLE.

Tender of Taxes not Required—Paramount owner of land may have a bill to quiet title as against one claiming under a tax title, without tender of the taxes and statutory penalties.—*Empire Co. v. Coldren*, 119.

REMOVAL OF CAUSES.

1. *Fraudulent Joinder of Defendant to Prevent*—An alien or citizen of another state has an absolute right, in a proper case, to remove to the federal court a cause pending against him in the state court, and this right is not to be defeated by joining as defendants, residents and citizens who have no interest in the controversy.—*Stratton's Independence v. Sterrett*, 33.

A plaintiff may join resident citizens as defendants, in his action against an alien or non-citizen, for the sole purpose of preventing the removal of the cause, provided he has a joint cause of action; but where in such case his complaint wholly fails to state a joint cause of action, such failure warrants the conclusion that the joinder of the resident and citizen defendants was fraudulent.—*Id.*, 27, 34.

Where a miner suing for an injury attributed by his complaint to the alleged joint and concurring negligence of his employer, an alien corporation, and the tram-boss and shift-boss, his immediate superiors, residents and citizens, in permitting the place of his work to be unsafe, not averring that the corporation had delegated to these individual defendants, or either of them the duty to make the place safe it was *held* that no cause of action was shown as against them, and notwithstanding their joinder the alien corporation was entitled to remove the cause.

An averment that the tram-boss had assured plaintiff that the place was safe, and ordered him to continue working there, not alleging that the tram-boss had any authority in this respect from the company, was held to state an independent cause of action against the tram-boss alone, which the corporation was in no manner responsible, and which therefore was no impediment to the removal of the cause on its petition.—*Id.*, 27.

2. *Issue of Fact*—Where a citizen and resident plaintiff institutes his action against citizen and resident defendants, and an alien defendant, a petition for removal, by the alien defendant, alleging that the individual defendants were fraudently joined, merely to prevent the removal of the cause to the federal court presents an issue of fact triable only in the federal court, and the cause is removable, for this reason alone.—*Id.*, 27.

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REMOVAL OF CAUSES—Continued.

3. *Petition*—Where the complaint in the cause sought to be removed shows upon its face grounds for removal, it is not necessary to repeat in the petition the facts so disclosed.—*Id.*, 29.

4. *Effect of Petition and Bond*—Where a petition showing grounds to remove the cause to the federal court is presented, with a sufficient bond, the jurisdiction of the state court, except to grant the petition, is ousted, the cause is at once removed, and all other proceedings in the state court are *coram non judice.* —*Id.*. 30.

STATE LANDS.

1. *State Land Board—Sale of Irregular Parcels*—The provision of the statute, Act of April 2, 1877 (Laws 1887, 328, Sec. 14) that all sales of state lands shall be made "in legal subdivisions of not more than 160 acres" has no application to the sale of an irregular parcel lying in two different subdivisions, not exceeding five acres in area.—*People v. Hard Land Co.*, 268, 269.

Subdivision Into Lots and Blocks—Sec. 13 of the Statute cited is permissive merely.—*Id.*, 268.

Sale Without Survey—A state patent will not be annulled merely becaues the sale of the lands was made without a survey, where there is no evidence that a survey was necessary, or that the area was greater than that for which it was sold.—*Id.*, 269.

The State Board should survey the public lands before the sale thereof, wherever this is necessary; but they have a discretion in the premises.—*Id.*, 269.

Notice of Sale—False but Not Misleading—A statement in the advertisement of the sale of public lands which though false can mislead no one, will be disregarded.—*People v. Hard Land Co.*, 267.

2. *Evidence of Action of Board*—The action of the state land board in directing a sale of public school lands to be made at a place other than the state capitol, as permitted by Secs. 12. 15 of the Act of April 2, 1887 (Laws 1887, 328), need not be made matter of record.—*People v. Hard Land Co.*, 266.

3. *Sale of School Lands by County Superintendent*—The sale of school lands, ordered by the State Board of Land Commissioners, and advertised and made by the County Superintendent of Schools, merely as auctioneer, and professing to act for and by authority of the state board, was sustained, no fraud, collusion or sacrifice of the land appearing, though, so far as appeared, no member of the board was present thereat.—*Id.*. 268.

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STATUTE OF FRAUDS.

Part Performance—Plaintiff solicited defendant to quit his ranch, move to town, take possession of, furnish, and conduct a hotel on certain premises, promising that if he would do so, he, plaintiff, would execute to him a lease of the hotel at a specified rent for a specified term of years. Defendant complied with this request, removed from his ranch, assumed possession of and furnished the hotel, and paid rentals monthly for several months. *Held*, a sufficient part performance to entitle defendant to specific performance of the contract of lease.—*Adcock v. Lieber*, 375.

STATUTES.

1. *Construction*—A statute (Rev. Stat. c. 127), requiring that all those proposing to follow the healing art shall submit to a certain examination, and prohibiting the practice of medicine without a license from the State Board of Medical Examiners, under a penalty, is to be liberally construed to accomplish its objects; it is not to be classed with those statutes which are construed most strongly against the people.—*Smith v. People*, 276.

Every statute must be read as a whole, and its meaning gathered from all its parts.—*Ferris v. Chalmers*, 370.

An attempt to extend, pursuant to the statute, the right given by statute in mortgaged chattels remaining in possession of the mortgagor, must strictly pursue the statute.—*Id.*, 372.

2. *Retroactive Effect*—A statute will not be construed as retrospective in its operation, even where there is no constitutional prohibition upon such legislation, unless it is clear that this was the intention of the enactment. The rule applies, as well where only the remedy is affected, as where substantive rights are involved.—*United States v. McPhee*, 435.

3. *Territorial Effect*—A statute under which a fraternal order is organized determines who shall be eligible as beneficiaries under its certificate, even where the certificate is issued by the head lodge and delivered by a subordinate lodge as its agent in another state.—*Mund v. Rehaume*, 136.

A statute which legitimates children born of a marriage which is thereby denounced as incestuous, and void, without judicial sentence, attends the child wherever he goes and makes him legitimate through life.—*Id.*, 136.

4. *Construed*—A statute (Rev. Code Sec 471, Mills Code Sec. 436) provides that "the judges of courts of record shall at all reasonable times, when not engaged in holding courts transact such business at their chambers as may be done out of court.

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STATUTES—Continued.

* * * They may hear and dispose of all applications for orders and writs which are usually granted on *ex parte* application, and may, in their discretion, also hear applications to discharge such orders and writs." *Held*, a positive direction that all judicial action had out of court shall be had at the chambers of the judge. *Held further*, that the chambers of a judge of the district court must be located within his district.—*Kirby v. Chicago Co.*, 85-88.

The provision of the code that to initiate proceedings to punish a contempt not committed in the presence of the court an affidavit of the facts constituting the alleged contempt "shall be presented to the court or judge (Rev. Code Sec. 356, Mills Code Sec. 322) imports that the affidavit is to be laid before the judge for judicial consideration and action; and under the provisions of Rev. Code Sec. 471, (Mills Code Sec. 436) such presentation must be to the court, sitting as a court, or to the judge, at his chambers, where alone, judicial consideration and action can be had.—*Id.*, 84, 85.

The provision of the Code (Mills Code Sec. 44, Rev. Code Sec. 50) that "from the time of the filing of the complaint * * * the court shall be deemed to have acquired jurisdiction," has not the effect to confer jurisdiction of the person by the mere filing of the complaint; to give it this construction would render it obnoxious to both the federal and state constitution and permit the taking of property without process, notice and day in court. The provision merely confers jurisdiction of the subject matter, not of the person.—*Empire Co. v. Coldren*, 122, 123.

The charter of the city of Denver provided that "an elective officer may be removed from office by petition of the electors, and an election thereunder, but no person shall be so removed from office, within six months after his election thereto."

Held that the purpose of the statute was to provide for the recall of an officer after he had served for the specified period, and had thus been placed on trial; that no other purpose could be rationally attributed to this limitation of the time within which a recall might be had; that the phrase "after his election thereto," imports not only the entire procedure for ascertaining the public will, but the induction of the candidate into office; that, therefore, a petition for recall, presented within less than six months after the officer had been admitted to his office—as the result of a contest of his election—though within more than six months from the day upon which the election was held. was premature.—*Tangeman v. Board of Aldermen*, 218, 219.

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STATUTES—Continued.

A statute regulating the practice of medicine and requiring all those who assume to follow that calling to secure a license from the State Board of Medical Examiners contained a proviso that "nothing in this act shall be construed to prohibit gratuitous services in case of emergency, nor the practice of the religious tenets or general belief of any church whatsoever, not prescribing medicines or administering drugs." Held the proviso does not justify or excuse the assumption by an unlicensed person of the title of Healer, the maintenance of a place where the sick or complaining are received and treated for hire, and the holding of one's self out as able to cure or relieve diseases, even though the cure is accomplished by the laying on of hands, and the accused is a preacher in a society incorporated with the object of effecting cures in this manner.—*Smith v. People*, 277.

The period prescribed by the phrase "within thirty days after maturity of the last installment of the indebtedness" in sec. 520 Rev. Stat., begins with the day succeeding the day of maturity. An extension granted on the day of maturity is premature. A purchaser of the mortgaged chattels from the mortgagor, after the lapse of thirty days from the maturity of the mortgage indebtedness, takes free of the lien of the mortgage, notwithstanding such attempted extension.—*Ferris v. Chambers*, 370. 371.

The act of congress of Feb. 24th, 1905 (33 Stat. part 1, 811), has not the effect to take away the action given by the act of August 13, 1894 (28 Stat. 278), upon the bond of a contractor for public work, to one who has provided labor or material for the work. Even conceding the power of congress, the statute is not susceptible of a construction which will give it retrospective effect.—*United States v. McPhee*, 432.

A statute requiring that "all abandoned mine shafts, pits and other excavations endangering the life of man or beast shall be securely covered or fenced," is not so uncertain in its terms as to be incapable of enforcement. The owner of the mining claim having excavated the shaft is under duty to enclose it.—*Richardson v. El Paso Co.*, 447.

And the statute extends not merely to such workings as are abandoned. in the sense that no intention to return to it or use it in the future, is entertained, but to those workings which are not in use for the operation of the mine from the surface.—*Id.*, 447.

And it applies as well to workings abandoned prior to its enactment, as to those subsequently abandoned.—*Id.*, 448.

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STATUTES—Continued.

It was intended to afford protection to the public generally, and extends even to the child of a mere licensee of the owner who resides upon the mining claim on which the shaft is situated.

And the statute requires, not merely that such a shaft shall be covered at the time of quitting it, but that reasonable care be exercised thereafter to maintain the cover or enclosure in reasonably safe condition.—*Id.*, 450.

A municipal ordinance provided that "no person shall do any plumbing to connect with or in connection with, any of the pipes of the department of water works," without a license. *Held* that the purpose of the provision was to protect the works from injuries which might be occasioned if unskilled persons, or those not under municipal control, were at liberty to intermeddle therewith; that it was not to be so limited as to apply only to plumbing work done upon the mains; that work upon private premises, intended to utilize water from the municipal system was likewise prohibited.

Working as a mere helper, without a license, for one without a license, is within the prohibition.—*Greene v. Loveland*, 595, 596.

Void—Effect—A judgment grounded solely upon a statute which this court has declared to be unconstitutional will be reversed.—*Colorado Co. v. King*. 181.

STATUTES CONSTRUED, CITED OR REFERRED TO.

Federal Statutes.

Act of August 13, 1894, 28 Stat. 278—*United States v. McPhee*, 432.

Act February 24, 1905, 33 Stat., Part I, 811.—*Id.*

State Statutes.

Revised Statutes 1908, Sec. 518—*Owen v. Owens*, 94.

Revised Statutes 1908, Sec. 520—*Ferris v. Chalmers*, 370, 371.

Revised Statutes 1908, Secs. 1848, 1849.—*Stumpff v. People*,

Revised Statutes 1908, Sec. 904.—*Western Co. v. Picket*, 420, 424.

Revised Statutes 1908. Sec. 910.—*Id.*

Revised Statutes 1908, Sec. 1527.—*Dunkle v. French*, 173.

Revised Statutes 1908, Sec. 1685.—*People v. Fitzgerald*, 177.

Revised Statutes 1908, Secs. 1848, 1849.—*Stumpff v. People*, 203.

Revised Statutes 1908, Sec. 1953.—*Trozzo v. People*, 329.

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STATUTES CONSTRUED—Continued.

Revised Statutes 1908, Sec. 1956.—*Chemgas v. Tynan*, 39, *People v. Heath*, 184.

Revised Statutes 1908, Sec. 1960.—*Chemgas v. Tynan*, 36, 39.

Revised Statutes 1908, Sec. 1997.—*People v. Fitzgerald*, 176.

Revised Statutes 1908, Sec. 2056.—*Whittle v. Denver Co.*, 382.

Revised Statutes 1908, Sec. 2566.—*Henderson v. Boulder County*, 365.

Revised Statutes 1908, Sec. 2603, clause 6.—*Adcock v. Lieber*, 376.

Revised Statutes 1908, Sec. 2612.—*Id.*, 375, 376.

Revised Statutes 1908, Secs. 2662, 2664.—*Id.*, 374.

Revised Statutes 1908, Sec. 2912.—*Breene v. Breene*, 345.

Revised Statutes 1908, Secs. 2919, 2920.—*Chemgas v. Tynan*, 36, 39.

Revised Statutes 1908, Sec. 3284.—*Haines v. Fearnley*, 318.

Revised Statutes 1908, Sec. 3307.—*Id.*

Revised Statutes 1908, Secs. 3786, 3787.—*King v. Watson*, 296.

Revised Statutes 1908, Sec. 3845.—*Id.*, 295, 296.

Revised Statutes 1908, Sec. 4034.—*Selfridge v. Leonard Heffner Co.*, 316.

Revised Statutes 1908, Sec. 4068.—*Western Co. v. Pickett*, 424.

Revised Statutes 1908, Sec. 4297.—*Richardson v. El Paso Co.*, 446-450.

Revised Statutes 1908, Sec. 4518.—*Johnson County Bank v. Gregg*, 362.

Revised Statutes 1908, Sec. 4522.—*Id.*

Revised Statutes 1908, Sec. 5561.—*County Court v. Watson*, 405.

Revised Statutes 1908, Sec. 5709.—*Gardner v. Cherry*, 152.

Revised Statutes 1908, Sec. 5733.—*Newsone v. Jacobs*, 592.

Revised Statutes, 1908, Secs. 6058-6075.—*Smith v. People*, 275-277.

Revised Statutes 1908, Secs. 6952-6600.—*Alexander v. Denver*, 146.

Revised Statutes 1908, Sec. 7212.—*Cone v. Eldridge*, 564.

Mills Statute, Sec. 1346d.—*Lewin v. People*, 137.

Mills Statute, Sec. 1897.—*Henderson v. Boulder County*, 365.

Mills Statute, Sec. 1901.—*Id.*

Mills Statute, Sec. 1936h., Rev. Sup.—*Id.*, 364.

Mills Statute, Sec. 1936c.—*Id.*, 365.

Mills Statute, Sec. 1936p. Rev. Sup.—*Id.*, 365.

Mills Statute, Sec. 3888.—*Empire Co. v. Coldren*, 121; *Monson v. Gillette*, 148.

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STATUTES CONSTRUED—Continued.
Session Laws.

Acts 1887, 328, Secs. 12, 13, 14, 15.—*People v. Hard Land Co.*, 260.

Acts 1894, c. 4, Sec. 5.—*Monson v. Gillette*, 149, 150.

Acts 1899, c. 109.—*People v. Hard Land Co.*, 260.

Acts 1907, c. 193, Sec. 16, 17, 18.—*Imperial Co. v. Denver*, 457.

Acts 1909, c. 196, Sec. 2—*Trozzo v. People*, 334, 337.

Revised Code, Secs. 25, 26.—*Kirby v. Union Pac. Co.*, 535.

Revised Code, Sec. 28.—*Wigginton v. Denver*, 379; *New York Co. v. Pike*, 238.

Revised Code, Sec. 45.—*Empire Co. v. Coldren*, 121, 122.

Revised Code, Sec. 50.—*Id.*, 122, 123.

Revised Code, Sec. 63.—*Michigan Co. v. Pueblo Co.*, 163, 164.

Revised Code, Sec. 78.—*Cone v. Eldredge*, 568.

Revised Code, Sec. 81.—*Bradbury v. Whitney*, 291-293; *Wigginton v. Denver*, 379; *Gumaer v. Bell*, 475-480.

Revised Code, Sec. 84.—*Wigginton v. Denver*, 379.

Revised Code, Sec. 164.—*Kirby v. Union Pacific Co.*, 532.

Revised Code, Sec. 194.—*Bradbury v. Whitney*, 291; *Mountz v. Apt*, 493, 494; *Epley v. People*, 503.

Revised Code, Sec. 331.—*County Court v. Watson*, 412.

Revised Code, Sec. 356.—*Kirby v. Chicago Co.*, 82.

Revised Code, Sec. 421.—*Bradbury v. Whitney*, 290.

Revised Code, Sec. 442.—*Knudson v. Frost*, 340.

Revised Code, Sec. 443, 444.—*Kirby v. Chicago Co.*, 85-88.

Revised Code, Sec. 471.—*Id.*

Revised Code, Sec. 481.—*Bradbury v. Whitney*, 290.

SUMMONS.

Service by Publication—To confer jurisdiction of the person by constructive service of process the statute must be strictly complied with. Where the record shows such service by publication only, upon an affidavit containing no positive averment of defendant's non-residence, no averment at all of defendant's departure from the state or his concealment to avoid process, nor of his post office address, the judgment is a nullity and may be assailed even collaterally, by any one with whose rights it conflicts.—*Empire Co. v. Coldren*, 121, 122.

The recitation in the judgment record that jurisdiction of the defendant has been obtained is not conclusive where a view of the entire record discloses the contrary.—*Id.*, 122.

Where the record is entirely silent upon the question it will be presumed in support of the judgment that the court proceeded regularly, and that what ought to have been done was done;

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SUMMONS—Continued.

but where an affidivat which attempts to show construction service of proof is found. it will not be presumed that some other and different showing was made.—*Id.*, 123.

TAXATION. See CONSTITUTIONAL LAW. INHERITANCE TAX.

Exemptions—The statute which assumes to relieve insurance companies from the payment of taxes upon their personality (Laws 1907, c. 193, Secs. 16, 17, 18) is opposed to sec. 10 art. X of the constitution and void.—*Imperial Co. v. Denver*, 456.

TAX TITLES.

Tax Deed—Sale to County—A tax sale is commenced on the 19th of the month. Certain lands are offered on that and the succeeding day, and on the latter day are struck off to the county. The sale continues until and upon the 26th of the month. The sale and the deed thereunder are void.—*Empire Co. v. Coldren*, 120; *Newsom v. Jacobs*, 581.

2. *Parol Evidence to Explain or Reform*—Parol evidence is not admissible to show that in fact the statute was complied with where the party asserting the tax title has failed to plead this state of facts.—*Newsom v. Jacobs*, 582.

3. *Limitation*—A tax deed void upon its face does not set in motion the five year statute of limitation (Rev. Stat. Sec. 5733).—*Id.* 583.

4. *Advertisement of Sale—Proof of Publication*—An affidavit of the publication of the notice of a tax sale of lands, showing no more than that copies of the papers were delivered by mail or by carrier to all regular subscribers in the county, is defective, —*Gardner v. Cherry*, 152.

5. *Supplemental Affidavit*—Where the affidavit of publication is defective, a supplemental affidavit supplying its defects. though made and filed only the day before the trial of an action in which the tax sale is contested, is admissible and to reject is error.—*Id.*, 154.

And where such supplemental affidavit is afterwards contradicted by affidavit of the same person who made it, the court should receive evidence, and determine which affidavit speaks the truth.—*Id.*. 155, 156.

The supplemental affidavit, secured and filed on the eve of the trial, is not a public record, and so above contradiction and impeachment by the same affiant, within the doctrine of *Sternberger v. Moffat*. 44 Colo. 520.—*Id.*, 56.

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TAX TITLES—Continued.

4. *Certificate Issued to County and Assigned by County Clerk*—Under the statutes in force prior to the revenue act of 1901 (Laws 1901, c. 94) a tax deed for land sold to the county, issued upon an assignment of the certificate by the county clerk, after more than three years from the date of the certificate is void.—*Empire Co. v. Coldren*, 148.

A tax deed recited the sale of the lands to the county; that in April, 1891. the grantee deposited with the treasurer a sum mentioned; a resolution of the board of county commissioners at a regular meeting in the same month and year, that the certificate might be assigned by the clerk to the grantee in the deed, for the amount so deposited; and that "in consideration of the premises, and in accordance with the provisions of sec. 5 of the Act of March 3, 1894." the clerk assigned and delivered the certificate to the grantee named in the deed. *Held*, that these recitals showed an assignment, not pursuant to any direction or authority of the board, but by the county clerk in his capacity as clerk, and by an authority assumed under the statute recited; and such assignment having been made more than three years after the date of the certificate. the deed was held void.—*Id.*, 149, 150.

TRIAL.

1. *Questions for Court or Jury*—Only when the facts are undisputed. and reasonable men can fairly draw but one conclusion is the question of negligence one of law for the court. The facts examined and the case held within the general rule.—*Jackson v. Yak Co.*, 558.

Where the facts are not in dispute, and unquestionably disclose negligence, it is the duty of the court to so declare as a matter of law.—*Colorado Co. v. Reynolds*. 236.

Where the facts are undisputed and susceptible of but one inference, what is the proximate cause of any result is for the court.—*Metallic Co. v. Watson*, 284.

The defendant induced the plaintiff's servant in charge of plaintiff's premises to leave them, and go to defendant's assistance. During the servant's absence a fire was kindled upon or near to plaintiff's premises, and was carried by the wind over his field. destroying the crop. *Held*, that neither the kindling of the fire nor the rising of the wind was occasioned by the servant's absence, and neither was the natural and legitimate sequence of such absence.—*Clark v. Wallace*, 439.

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A shaft excavated upon defendant's mining claim was abandoned in 1902, and was then securely covered. It was two hundred feet in depth. In 1904 boards were laid crosswise of those which were put down in 1902, but those so originally laid were not examined. In 1906 an employe was instructed to re-cover all the shafts of the company, and laid new boards in place of those which were missing. He made no examination of the boards which were in place. No inspection was afterward made to determine whether this servant had complied with the order. New stringers or timbers were never put in. Within a radius of four hundred feet from the shafts were fifteen or sixteen houses occupied by families with children, to the number of about twenty, ranging from two to sixteen years of age. These children often played upon the dump of the shaft, and the superintendent of defendant had notice of this. In July, 1907, the plaintiff's son, a boy of nine years, fell into the shaft and was killed. The evidence tended to show that some of the boards were loose, some were warped and corroded by the dry rot. and that only one of them was sound. The stringers supporting them were so decayed that they would not hold a nail. It only required a slight jar to disturb the boards, and the child probably jumped or stepped upon a board which broke under him, or upon one which was lose. It was held a case for the jury.—*Richardson v. El Paso Co.*, 449-452.

2. *Pleading and Evidence—Variance*—Where, in an action for personal injuries, the plaintiff, both by pleading and bill of particulars describes his injuries with particularity, he is not to give evidence of injuries which are in no wise specified.—*Denver Co. v. Cowan*, 76.

Evidence that plaintiff since the injury, had been unable to attend to business was held properly admitted, as tending to show the extent of the injury, and its permanent character, even though the complaint made no claim for loss of time or interference with the plaintiff's business.—*Id.*, 76, 77.

TRUSTS AND TRUSTEES.

Deposit of Trust Funds—One who receives money to hold for another, should, if he places it in bank, deposit it as a trust fund, and not to his individual credit.—*People ex rel. v. Humbert*, 62.

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VENUE.

Change of Venue—A corporation organized under the laws of New York was conducting business in Colorado, maintaining its principal office in the City of Denver. In an action instituted in another county, the process in which was served in Denver, it applied for a change of venue to the County of Denver, on the ground that its residence was in that county. *Held*, that under Rev. Code, sec. 29, the motion was properly denied.—*New York Co. v. Pike*, 242-244.

Sections 25 and 25a of Mills' Code (Rev. Code secs. 25 and 26) refer exclusively to actionsc *in rem*, where specific property is directly affected. An action to restrain intereference with the business of a railway company by unlawful dealing in its non-transferable tickets in a transitory action *in personam*. The sections quoted have no reference to such an action.—Kirby *v. Union Pacific Co.*, 535.

Time to Apply—An application for the change of the venue must be made as soon as the moving party has knowledge of the facts which entitle him to change. A general appearance and pleading to the merits is a waiver of the right.—*Kirby v. Union Pacific Co.*, 541, 542.

WATER RIGHTS.

1. *Proceeding to Adjudicate Priorities*—The proceeding under the statute (Rev. Stat. c. 72 Art. IV) to adjudicate priorities, is a special proceeding, and not a civil action under the code.—*Haines v. Fearnley*, 319.

The owner of a ditch, in order to be entitled to a decree settling its priority must show its construction, a diversion of water from the stream, the carriage of the water through the ditch. and a beneficial application of the water to the land.—*Weldon Valley Co. v. Farmers Pawnee Co.*, 547.

2. *Beneficial Use.* The test of beneficial use of water for irrigation, and the extent of such use, is not the area irrigated in each year.—*Weldon Valley Co. v. Farmers Pawnee Co.*, 549.

The irrigation of a newly settled farm in the public domain is a continuing process, requiring a number of years. The settler may excavate his ditch or purchase a water right, in anticipation of what will be required to irrigate the whole of his plantation, and so apply and use the water that when the right has ripened he will have sufficient to irrigate the whole.—*Id.*, 549.

But no beneficial use can be made of a larger volume than is necessary to irrigate the land to which it is applied.—*Id.*, 550.

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WATER RIGHTS—Continued.

3. *Appeals—Must Conform to Statute*—One appealing from an order made in such proceeding must follow the provisions of the statute even though his complaint is directed not to any award of priority to the use of water, but to a clause of the decree assuming to establish in the owner of a certain ditch a way over private lands of the appellant.—*Id.*, 319, 320.

An appeal attempted without reference to these provisions, but under the provisions of the code must be dismissed.—*Id.*, 321.

4. *Conflicting Decrees in Different Districts*—In *Weldon Valley Co. v. Farmers Pawnee Co.*, 545. a bill to settle the appropriation of different ditches in different water districts, and the volumes to which they were severally entitled, under the previous decrees rendered in statutory proceedings, was entertained. The amount decreed to one was declared excessive.

WITNESSES. See EVIDENCE.

WRONGFUL DETAINER. See FORCIBLE ENTRY.

WORDS AND PHRASES.

Cases cited, showing the various meanings ascribed by the courts to the word "election," under varying circumstances.—*Tangeman v. Board of Aldermen*, 214, 217.

"After the maturity of the last installment" of a debt, prescribes a period beginning with the day following that on which the debt matures.—*Ferris v. Chambers.* 370.

The station agent of a railroad company charged with the duty to communicate to the conductor and engineer of the several trains the orders of the train dispatcher as to where they are to pass other trains, is "managing the trains," within the meaning of Mills Stat. sec. 1508 (Rev. Stat. sec. 2056). If by his negligent failure to deliver an order, a collision occurs, and the death of a passenger results. the railway company is liable.—*Whittle v. Denver Co.*, 382.

"Lode," *Richardson v. El Paso Co.*, 445, 446.

"Shall be presented."*Kirby a. Rock Island Co.*, 84, 85.

"Election," *Tangeman v. Board of Aldermen*, 208.

"As often as, or where occasion may require," *County Court v. Watson*, 409.

Prosecute in any suit," *Western Co. v. Pickett*, 420, 421.

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